S. HRG. 101-651, PT. 1

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY

APRIL 5, MAY 2, 11, JUNE 15, AND JULY 26, 1989

Part 1

Serial No. J-101-6

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
27-871 WASHINGTON : 1990

S 521-39

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

27-871 0 - 90 - 1

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CONFIRMATION HEARING ON: PAMELA ANN RYMER, ROBERT C. BONNER, MELINDA F. HARMON, AND WILLIAM P. BARR

WEDNESDAY, APRIL 5, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:07 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Thurmond and Simon.

OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. The hearing will come to order. I welcome you all here today. I have a brief opening statement, so that I do not curtail my colleagues any longer than they should be curtailed.

This afternoon, the Judiciary Committee holds its first hearing of the 101st Congress to consider the nominations to the Federal courts, as well as the Justice Department. I am delighted to chair this first hearing and I look forward to working with my colleagues who will chair subsequent hearings.

We will hear testimony today on one court of appeals nomination, and two Federal district court nominations. Pamela Ann Rymer has been nominated to the Court of Appeals for the Ninth Circuit. Robert C. Bonner has been nominated to the U.S. District Court for the Central District of California, and Melinda F. Harmon has been nominated to the U.S. District Court for the Southern District of Texas. All three have been nominated by the President. We will also hear testimony today on the nomination of William Barr to be Assistant Attorney General for the Office of Legal Counsel.

This committee has traditionally considered judicial nominations before the Justice Department nominees when both are on the same agenda, and that is the order in which I intend to proceed today.

Since this is the first of the judicial nominations hearings of the 101st Congress, and indeed the first judicial nominations hearing held during the administration of President Bush, I would like to make some very brief comments.

I have said on many occasions in the past that I consider the exercise of our responsibility of advice and consent on judicial nominations to be one of the most important, if not the single most important responsibility of a U.S. Senator.

It probably goes without saying that the past administration and I on occasion did not see eye to eye on judicial nominees, and to some degree that was to be expected. But the process of selecting nominees in general, and in some cases the selection of particular nominees, seemed to be driven more by ideology than by any other consideration and, in turn, generated a similar response here in the committee and in the Senate. That worked to no one's benefit, neither the administration nor the Senate and, most importantly, the people whom we are all here to serve.

I am hopeful and confident that with the inauguration of the new President and new administration, we will, in fact, get off to a much smoother start and finish on a much smoother note.

We have an opportunity to start on the right foot in one of the most important aspects of the relationship between the Bush administration and the Judiciary Committee. Only time will tell whether or not my instinct is correct, but I am confident it is.

I hope that the administration is committed to a truly representative judiciary, and I hope that it will select nominees that adequately reflect the Nation's diverse peoples and cultures, and I think in our nominees today we see some evidence of that diversity.

We have had some disagreement and confusion on this committee and in the Senate about whether or not there are enough women being appointed. Today, it seems somewhat auspicious that of our first nominees today, two of them are women.

I would like to see the participation not only of the American Bar Association, with whom we met yesterday, in this process of determining whether or not a nominee has the proper professional credentials, but also groups such as the Hispanic bar and the National Bar Association and others on both the right and the left, groups that were for the most part excluded from the process during the previous administration.

It is particularly important, I might add, to touch base with local groups in the geographic area in which the prospective nominees have practiced. The experience of this committee has been that these groups have a wealth of knowledge and can be extremely helpful. I direct this mostly to the American Bar Association, which has a tendency to interview only other lawyers, and other judges, and does not go beyond that group of people within the community to determine the reputation and background of nominees.

For my part, this hearing reflects a plan I intend to pursue on judicial nominations. There will be no delays in holding hearings as long as the nominees are well qualified; and hearings will be scheduled in a timely and responsible way.

I would add, however, that thoroughness is more important than speed, and I would not let outside pressure to move more quickly undermine the solemn responsibility that we must exercise in reviewing lifetime appointments.

In the end, I hope that the Bush administration will take seriously, as it has thus far, the advice component of the Senate's advice and consent responsibilities, and not only seek the advice of this committee and the advice of the Senate as a whole, but seek the advice of the Senators in the States from which the nominees are to come. We tended to avoid that in the past.

I know some view that as pure politics. I view that as part of the responsibility of the Senate and individual Senators, and will adhere to that view as long as I chair this committee. There is no doubt in this Senator's mind that the more we can work together, the less devisive and polarized the debate on judicial nominations will be.

As this committee has customarily done, we will hear first from the Senators who wish to introduce the nominees. My colleagues are, of course, welcome to stay the entirety of the hearing, although I know they are required at committees, just as I am now, but you are all welcome, all of my colleagues, to stay, sit up here with us, or in the audience, or at the table. But I will fully understand, and I am sure the nominees will understand. if you are unable to do that.

Before we begin these introductions, let me note for the record that each of the nominees has completed an extensive questionnaire on his or her qualifications, experience, and financial situation. The publicly available portions of these questionnaire responses will be printed in the record at the end of this hearing.

We will also keep the record open for a limited time for followup questions to the nominees and for additional questions that may be submitted by members of the committee who are unable to be present this afternoon. We will also include in the record the complete introductory statements of Senators, including any who are unable to attend in person today because of scheduling conflicts.

Now, I would like to invite—and I understand all of our colleagues have time constraints, but particularly Senator Wilson, I am told, has a particular time constraint. But let me invite—I think we have room at the table. No, we don't have room at the table.

Why don't you and the nominee you wish to introduce—I believe it is the Honorable Judge Rymer, if I am not mistaken—come to the table at this moment, and if you would be kind enough to—Mr. Bonner, whom you are also going to introduce, please come to the table. I hope my colleagues will indulge our friend from California.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator Wilson. Thank you very much, Mr. Chairman, and I thank my colleagues for their courtesy.

The Chairman. I want you to know that at least one of your colleagues in the back said, indulge that much, so I just want you to——

Senator Wilson. I think I can judge which one. I will do you all the courtesy of not reading you my testimony on the 1990 water appropriations measure, where I am due next.

Mr. Chairman, first of all, welcome back.

The Chairman. Thank you.

Senator Wilson. It is good to see you in good health, and I am also very grateful for the opportunity to introduce two exceptional nominees for appointment to the Federal bench.

Judge Pamela Ann Rymer has been nominated for appointment to the Court of Appeals for the Ninth Circuit, while U.S. Attorney Robert Bonner has been nominated to replace her on the District Court in the Central District of California.

Both Pamela Ann Rymer and Rob Bonner are veteran lawyers. They have extensive experience in both private practice and in public service. Both are recognized in and outside the legal community for their efforts in furtherance of a number of not just good causes, but those that have contributed to an essential improvement in the quality of life within the Central District.

Judge Rymer was the first of 18 California district court nominees confirmed during my first term in the Senate. Her service over the past 6 years has made abundantly clear the wisdom of President Reagan's nomination of her and the Senate's vote of confirmation. A clear indication of her outstanding service is that the Los Angeles Bar Association named her the outstanding trial jurist of 1988–89.

She is a graduate of Vassar College and the Stanford University Law School. She has more than 16 years of experience in private practice and, as I mentioned, 6 years on the Federal bench where she has rendered distinguished service.

Judge Rymer has been active in the bar on antitrust issues, on judicial selection, and matters of legal and judicial ethics. She also has devoted significant time to an issue of great importance to all of us, to President Bush, the Congress, to the American people, and that is the issue of education.

Not only is she a member of the Board of Visitors at Stanford Law School and at Pepperdine Law School, but by appointment of then Governor Reagan and then reappointment by Governor Jerry Brown, she served on the California Post-Secondary Education Commission and was its chairman for the years 1980 to 1984.

Rob Bonner is a distinguished public servant doing an outstanding job as the U.S. attorney in a district where both violent crime and white collar crime have been growing, where more resources are required in the way of DEA agents, assistant U.S. attorneys, and others in order to assist him in the very considerable efforts he has been making to win the war on drugs.

If he looks familiar to you, Mr. Chairman, and to the members, it may be because he has testified some six times before congressional committees, including, I believe, the Judiciary Committee.

He is a magna cum laude graduate of the University of Maryland and received his law degree from Georgetown. He clerked for a Federal judge, served 4 years in the Navy Judge Advocate General Corps, 4 years as an assistant U.S. attorney, 9 years in private practice, before being appointed by President Reagan in 1984 to be the U.S. attorney in the Central District of California.

The U.S. attorney's office in Los Angeles has more than 100 lawyers working to enforce Federal law in an area that has a population of over 10 million people. I think you, Mr. Chairman, in your capacity as the chairman of the Senate drug caucus, know full well the role that he has performed and the efforts that have been made, rather heroic efforts, to try to meet the challenge, to understate it considerably, of the drug situation in Los Angeles.

Rob's efforts against the proliferation of drug gangs, his establishment of an inter-agency task force, his extensive cooperation with local law enforcement, his advocacy and administrative effort to secure for local law enforcement agencies their rightful share of the asset forfeiture program funds, have resulted in his being a deservedly popular U.S. attorney. His popularity is based upon the assessment by law enforcement of his effectiveness in that role.

He has spent a great deal of time in court during his career both in and out of Government. As U.S. attorney, he personally prosecuted the FBI agent turned spy, Richard Miller, through a 10-week trial that resulted in a hung jury by the vote of a single juror, and then through a 14-week second trial that led to Miller's conviction.

He has also supervised massive investigations into drug trafficking and money laundering, as well as significant defense contractor fraud and political corruption cases. As I have indicated, he has testified many times on white collar crime and drug gang problems before congressional committees and subcommittees, and he has received, I might say, the highest recommendation from the screening committee upon which I rely for central district nominations.

In short—and I have, believe it or not, cut it short, Mr. Chairman—these are two truly outstanding nominees. They have rightly earned not just the confidence, but the enthusiastic support of their peers on the bench, on the bar, and in a wider community than the immediate legal community.

These are extraordinary citizens and role models and highly competent professionals. So it is with great pleasure and great enthusiasm that I commend them to this committee.

The CHAIRMAN. Thank you, Senator, and thank you for your enthusiasm and thank you, also, for welcoming me back. Some of us hope you stay. You are too tough, but thank you very much.

What I would do now is excuse the nominees for a moment until we get the next panel. Just so we all know the mechanics here, I am going to bring up each State panel and, in the meantime, have a statement by our colleague while we are shifting chairs here, and then I will bring you all up to be sworn in.

Senator THURMOND. Well, I guess you will be leaving, Senator Wilson. I just want to say that studying the records there of these two people, they appear well qualified and I will be glad to support them.

Senator WILSON. Thank you, sir.

Senator THURMOND. And we thank you for your time in coming here in person and speaking in their behalf, and your strong prestige in the Senate will have great effect.

Senator WILSON. Thank you very much, sir.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman, I am pleased to be here today, and it is a special pleasure to have you preside over these nomination hearings. Your presence demonstrates your personal concern and reflects the spirit of cooperation that is essential to the committee when it is considering such important matters.

Mr. Chairman, I know you share my concern that each and every nominee receive a full and fair hearing. I am confident that will occur. You have always been accommodating on matters such as this and I look forward to working with you during the One Hundred First Congress.

I hope the committee will act as expeditiously as possible to complete its inquiry on all nominations. Our citizens and our country suffer when the Federal judicial system does not have its full complement of judges.

Mr. Chairman, you are to be commended for your work on this committee. I offer my full cooperation and will do all within my power to assist in the extremely important task for processing nominations.

Again, I am pleased we have having this hearing today. I would like to welcome each of the nominees to the committee. I understand that in your opening remarks you stated that there would be no delay, and I commend you for that, also.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, sir.

Now, next on our list here is Senator Gramm, and I understand Senator Gramm has two of his House colleagues who made their way over here.

Senator GRAMM. Mr. Chairman, if you don't mind, our dear colleagues from Virginia claim to have more pressing business than I have.

The CHAIRMAN. OK, I will yield to that. I welcome my colleagues from Virginia and I apologize for following the schedule here. [Laughter.]

I should have known better. Nothing ever goes on track in this committee.

Senator Warner, welcome, and it is particularly nice to welcome you, Senator Robb, for the first time before this committee.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman, and the distinguished ranking member, the Senator from South Carolina. I thank the prioritization. I have to open a hearing in my committee momentarily on Mr. Atwood, the Deputy Secretary of Defense, at 2:30.

I certainly join those in welcoming you back, Mr. Chairman. We have had a warm friendship, although differed on some issues through the years. I can remember very well, I was presiding one night, only one other Senator in the Chamber, and that was you, and you gave one of the best speeches I ever heard in my life in the U.S. Senate. It was a shame there were just but two of us there benefiting. [Laughter.]

The CHAIRMAN. Well, I am flattered by your comments, and you must be relieved to know that no one can challenge the statement you made.

Senator WARNER. That is right.

The CHAIRMAN. Thank you.

Senator **Warner**. I meant that sincerely, and to the distinguished ranking Member, indeed, he is beloved and cherished by all. No two Members of this body have a greater impact on the third branch of our Government, the judicial branch, than the chairman and the ranking member of this committee, and I think both of you have served that fiduciary capacity very, very well.

Mr. Chairman, I welcome the opportunity to appear at the first hearing before this committee with my distinguished colleague from Virginia, Mr. Robb. We have been friends for many, many years and we share the privilege of introducing today Mr. William P. Barr for the Office of Legal Counsel. It is one of the most important offices in the executive branch.

We are fortunate that Mr. Barr is the President's nominee for Assistant Attorney General for this office. His resume is impressive, and I am just going to ask that it be incorporated in the record.

The **Chairman**. It will, without objection.

Senator **Warner**. He is joined here today by his wife, Christine Moynihan Barr, and his three daughters, Mary Kate, Patricia, and Meg, and I wonder if they might be recognized by the Chair at this time.

The **Chairman**. Please, would you all stand.

[The members of the family stood.]

The **Chairman**. Well, thank you, ladies, all four of you, for coming.

Senator **Warner**. I think one is present, but slightly below the eye level here.

I am pleased that the President has chosen such a fine individual to hold the position of Assistant Attorney General for the Office of Legal Counsel. His ability, his devotion to the law, and his integrity are without question. His broad mix of experience, 7 years in Government and 9 years in private practice, ideally suit him for the job.

I urge the members of this committee to act swiftly on this nomination, and I thank the Chair.

The **Chairman**. Thank you, Senator.

Senator Robb.

STATEMENT OF HON. CHARLES ROBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Robb**. Mr. Chairman, Senator Thurmond, I am delighted to join you and to join with my distinguished colleague and senior Senator, Senator Warner, in bringing to you Bill Barr for nomination today.

Senator Warner has already included or referred to his qualifications. I would note with particular interest any father of three daughters who would come to a confirmation with him seems to me an appropriate qualification for any office, finding myself in the same situation.

I have checked with his neighbors and nobody has any complaints about him. On that basis and on the basis of the fine record that he has compiled, I recommend him to you for confirmation, and I don't want to have a challenge from Senator Gramm as to who has the most pressing schedule at this point.

Thank you.

Senator **WARNER**. That is correct. We thank the Chair and we thank Senator Gramm.

Senator **THURMOND**. Mr. Chairman, just let me say a word.

The **CHAIRMAN**. Yes.

Senator **THURMOND**. Senator Warner, we are very glad to have you with us. You have said such nice things about the Chairman and me that I think we will come to Virginia next year and join Senator Robb in speaking for your reelection. [Laughter.]

Senator **WARNER**. Well, thank you very much. That might get a footnote in history.

The **CHAIRMAN**. It would be a footnote if I spoke for you, I am afraid.

Senator **THURMOND**. Senator Robb, we are glad to have you with us, too.

The **CHAIRMAN**. Now, the Texas delegation, at least one half of the Senate delegation and one-twentieth of the House delegation that is here. I welcome Senator Gramm and thank him for his generosity in letting his colleagues precede him, and also, Congressman Andrews, thank you very much for coming. Congressman Laughlin, I appreciate your presence, also; we appreciate it.

Senator.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator **GRAMM**. Mr. Chairman, you have been back so long that I had forgotten you had been gone.

The **CHAIRMAN**. So have I.

Senator **GRAMM**. I am glad you are back and I am sure you are happier than I am that you are back.

The **CHAIRMAN**. That is true. I have no doubt about that. [Laughter.]

Senator **GRAMM**. Mr. Chairman, I am happy to be here today and I want to thank my two dear colleagues from the House for coming to join me in recommending Judge Melinda Harmon for the position of U.S. district judge of the southern district of Texas.

Mr. Chairman, before I begin, Melinda has her husband and three children here and I would like to ask them to stand up—Frank, Molly, Phelps, and then a smaller Frank. [The members of the family stood.]

And you can see the smaller Frank was held up so that he did, in fact, show through in the crowd.

The **CHAIRMAN**. Welcome. This will be painless.

Senator **GRAMM**. I would like to note, Mr. Chairman, that in the process of helping to produce those three beautiful children, Melinda Harmon has had a very active professional career from the day that she got out of law school.

Mr. Chairman, Melinda Harmon grew up on a dairy farm outside Denton, TX. She got a scholarship to go off to the northeast to Harvard University and Radcliffe College.

The **CHAIRMAN**. You are still introducing her?

Senator GRAMM. Yes, I am.

The CHAIRMAN. After all you have said about both those places? [Laughter.]

Senator GRAMM. She graduated with honors. She came back and went to the University of Texas Law School. She graduated in the top 10 percent of her class. She went to work as a law clerk for John V. Singleton, who is the former chief judge of the Southern District. And, in fact, Mr. Chairman, I think it is worthy of noting it will be his seat, if she confirmed, that she will take. She worked for him as a law clerk some 15 years ago.

From that position as a law clerk, she went to work as a corporate attorney with Exxon Co. USA. In that capacity, she has had a distinguished law practice, representing that major corporation in many complicated and important lawsuits.

She was appointed and subsequently elected judge of the 280th Judicial District of Texas.

Mr. Chairman, I could go on at great length, but I think the bottom line about Judge Harmon is that she is smart, she is a student of the law, she has a distinguished career both as an attorney and as a judge. I believe that she will do an excellent job as a U.S. district judge.

Our dear friend from Virginia reminded me that I did not nominate her; that, in fact, the President did, and in doing so he instructed both of us, and I see that it did take on you and did on me. I am very proud of Melinda Harmon and I am sure she will do an outstanding job and I commend her to you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Congressmen, whatever order you have decided. I never get into House fights.

STATEMENT OF HON. MICHAEL A. ANDREWS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. ANDREWS. Thank you very much, Mr. Chairman. I really enjoyed having you in Houston this last week. I didn't get a chance to see you after your remarks, but they were well made.

The CHAIRMAN. I had to get out of town quickly.

Mr. ANDREWS. I thought as I walked over here how difficult your task is and the task of this committee. I read recently a book called "Kennedy Justice." I don't know if you have had an opportunity to read that book, but it is a fascinating explication of the Kennedy years and some of the judicial appointments that were made during that time, some of which were not particularly good judicial appointments.

It is always so difficult, I think, to look at a resume—and I am sure you as a committee see hundreds and thousands of them in the course of a Congress.

The CHAIRMAN. I might add that is one of the reasons why—and I am not fooling about this—why Senator Thurmond and I put such stock in whether or not the Senators from the States from which the nominees come are, in fact, supportive of that nominee.

Mr. ANDREWS. Well, it is a difficult task, and I must say Senator Gramm has done an excellent job in Texas, at least in Houston, the area that I am aware of, in making appointments and recommendations to this committee.

He has established a committee in Houston of lawyers, Democrats and Republicans, that has evaluated applicants and sought out exemplary lawyers to be Federal judges, and his appointments have been good ones.

Today the committee has an opportunity to review the application of Melinda Harmon, a person I have known for, oh, I guess, about 15 years now. I have known her family; I know her well. She is a presiding judge in Houston, and a very good one.

She brings rare talents to the bench. She is a person of unquestioned intellect. As Senator Gramm has mentioned to you, her academic background is exemplary. But more important than that, in that gray area of trying to decide whether someone is going to be a good judge or not, she has proven that on the bench.

She is very hard working, and I think for a Federal district judge with workloads like they have in the Southern District of Texas, that is about half the battle. She works hard. She is earnest about her job.

Finally, I think she is someone that will bring great judgment to the bench—such an important thing in a district judge that will try so many cases, and in Houston now, a growing number of drug cases, like you mentioned in Houston the other night.

She will be an outstanding Federal judge, and it is an honor for me to speak for Melinda Harmon. I recommend her highly to the committee. I look forward to her serving on the bench in Houston. I know she will be a great judge for our country.

The **Chairman**. Thank you, Congressman.

Congressman Laughlin.

STATEMENT OF HON. GREG H. LAUGHLIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. **Laughlin**. Thank you, Mr. Chairman, and Senator Thurmond and Senator Simon. I am proud to be here to also support Melinda Harmon. I practiced trial work in Houston, for 15 years before moving back home to the adjoining county to Houston and I know most of the trial lawyers in Houston because a larger percent do not try lawsuits in Houston, and Melinda Harmon has the reputation that both Senator Gramm and Congressman Andrews have testified to.

From my knowledge of talking to lawyers, guys and gals that show up in the courtroom will say the unkind things about a judge and about a fellow lawyer that they may not say out in public. And I will tell you and this committee that I have never heard anything but complimentary remarks from the trial lawyers that have been before Judge Harmon.

She enjoys the reputation of intellect, which is important. But more important than that to me is she enjoys the reputation of integrity and fairness, which often is far more important for one who is sitting in judgment on citizens' lives and freedom and, secondarily, their monetary disputes.

She will bring great credit not only to my profession, but she will bring great credit to America, and I commend Senator Gramm for making such an outstanding nomination to the President and to this committee and I certainly urge full support.

The CHAIRMAN. Well, thank you, Congressman. Particularly in light of your reference to your practice; that is useful information for the committee to have.

I thank you all and, judge, if you will not leave because I am going to call each of the nominees up to be all sworn in at once and then we will start——

Senator SIMON. Could I just add one thing, Mr. Chairman?

The CHAIRMAN. Yes. I beg your pardon.

Senator SIMON. I appreciate both House Members being here, one of whom I had the privilege of serving with.

We just had a meeting yesterday with leaders of the American Bar Association in which, among other things, I complained about the quality of too many of the nominations. I want to say in Phil Gramm's presence that he has been giving us quality nominees.

Senator GRAMM. Thank you, Paul.

Senator SIMON. And while I anticipate you and I won't be voting together all the time in the Budget Committee in just a couple of weeks——

The CHAIRMAN. I expect hardly ever. [Laughter.]

Senator SIMON. But I want to say I really appreciate the quality job you have done in bringing nominees to this committee.

Senator GRAMM. Thank you, Paul. Mr. Chairman, he did vote for Gramm-Rudman. He might be President today if he had voted the other way. [Laughter.]

Senator SIMON. Well, I did vote for Gramm-Rudman.

The CHAIRMAN. So did I. That is maybe why both of us lost. [Laughter.]

I don't know. I still think it is a good idea.

Senator THURMOND. Mr. Chairman, I want to welcome these members of Congress here. We appreciate your coming. You didn't have to come here, and you have come on her behalf and it is greatly appreciated.

And I want to say for Senator Gramm, he is one of the ablest, most articulate men in the Senate. And with him backing this lady and the Congressmen backing her, I am sure the chairman will get her right out.

The CHAIRMAN. Judge, you have to understand one thing about Senator Gramm. One of the reasons why I am sure the President has gone along with his nominees, unlike other Senators, and one of the reasons why people say nice things about him is probably because the past President and this President are more afraid of what they would have to put up with if they didn't go along with him. And the reason why we say nice things about him is we feel the same way. [Laughter.]

At any rate, seriously, Phil, thanks.

Senator GRAMM. Thank you.

The CHAIRMAN. Thank you all very much, and thank you for coming to the other body, gentlemen.

Mr. ANDREWS. Thank you, Senator.

The CHAIRMAN. It is a long walk, I know. Thank you very, very much.

Judge, would you stay seated for a moment? I would ask the other nominees all to come forward—Mr. Barr, Judge Rymer, Mr. Bonner, Judge Harmon—all at once. Would you all please stand to be sworn at once and then we will begin with Pamela Ann Rymer as our first witness?

Do you all swear that the testimony you are about to give in this proceeding will be the truth, the whole truth, and nothing but the truth?

Judge RYMER. I do.

Mr. BONNER. I do.

Judge HARMON. I do.

Mr. BARR. I do.

The CHAIRMAN. Fine, thank you. Now, you are all sworn, but we will begin with the Honorable Pamela Ann Rymer.

Judge, is any family here with you, because we usually introduce family at the time the nominee comes forward? If there is, we would be delighted to——

TESTIMONY OF HON. PAMELA ANN RYMER, LOS ANGELES, CA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT COURT OF APPEALS

Judge RYMER. Someone who I consider as part of the family who was a very special law clerk who is now working in the Lands Division in the Department of Justice, Steve Silverman, and I am very touched that he is here.

The CHAIRMAN. Well, thank you, and welcome. It is nice of you to come.

And I might add before we begin one comment. Judge Rymer, when the family was introduced, one of the young tykes was held up so we could see him. In 1978 when I decided to run for reelection we got my family together and my boys were relatively young then, and I said, boys, do you think we should run and they said yes. This is an absolutely true story.

I said, is there anything you don't want to do? And they said, daddy, two things, and one turned to the other and said, Beau, you tell him, and Hunt said, no, you tell him. And, finally, the youngest one, Hunter, said, daddy, we don't want to do any more parades, and please don't hold us up or make us stand on a chair when you introduce us. [Laughter.]

So the day will come when he won't have to stand on a chair. That is an absolutely true story, and I have done neither since and I go to parades by myself. [Laughter.]

At any rate, Judge Rymer, I do appreciate your being here. Obviously, you were anxious to be here at an earlier date. Do you have an opening statement you would like to make?

Judge RYMER. No, sir, other than to join those who have welcomed you back to health and to the Chair of this committee. I would like to thank the President for his confidence in my nomination, and particularly to thank Senator Wilson for his support in my nomination before and coming here today.

The CHAIRMAN. Well, I do not have a whole number of questions, but as you know, Judge, in preparation for these hearings, the able staff behind us, both minority and majority staff, if you have been on the bench, read your decisions and review what you have done on the court.

I must say you are a person of exemplary integrity and your background is blemishless, but what I want to talk to you about today is not about your temperament or your character, but about how you think about some of the issues that are before you and were before you, and particularly I would like to first, if I may, ask you a few questions about claims for attorneys' fees in civil rights cases.

In determining attorneys' fees for civil rights cases, in *Hammer* v. *Rios*, you denied the fees because of the existence of a contingent fee arrangement. You have also reduced hours and costs in civil rights cases.

I would like to ask you, do you evaluate the performance of an attorney who litigates a civil rights claim differently than attorneys who may litigate a major corporate issue before you?

Judge RYMER. No.

The CHAIRMAN. There is no difference in the evaluation, as you look at them?

Judge RYMER. No, sir.

The CHAIRMAN. Do you believe that attorneys who litigate civil rights cases should be paid less than the top market rate received by other litigators?

Judge RYMER. No, I do not. I believe that their justification for attorneys' fees ought to be as substantiated as it is in any other matter in which attorneys' fees requests are made.

The CHAIRMAN. The flip side of that is if it is substantiated, you don't believe there should be any less financial compensation?

Judge RYMER. No, I do not.

The CHAIRMAN. Judge Rymer, in one of your decisions, *Quarter* v. *Gates*, you seemed—and I emphasize seemed—to rely on whether the case had substantial economic value in determining whether to award fees and costs.

Do you believe civil rights cases should only be tried if they have substantial economic value?

Judge RYMER. To the contrary, I have held on a number of occasions and have said in connection with those matters that $1 of compensatory damages entitles the attorney to attorneys' fees and costs, and I believe that the principal value of a civil rights action is to redress constitutional violations, not necessarily for the recovery of economic damages, although, if proved, certainly the plaintiff is entitled to those as well.

The CHAIRMAN. But beyond the question of whether or not the attorney or attorneys should be compensated, do you believe that there is any relationship between the economic value of a civil rights claim and whether or not the claim should be brought?

Judge RYMER. None whatsoever. In the *Quarter* case, as I recall it, the relationship drawn was not between economic value of the lawsuit, but rather the settlement which had been offered and rejected in relationship to the ultimate recovery, and whether additional time spent by the attorney was reasonably compensated at a higher rather than a perhaps less high rate.

The CHAIRMAN. So that if there were a claim relating to attorneys' fees and it was in a noncivil rights case where there had been an offer made of settlement, the settlement rejected, the case pursued, and a judgment lower than the settlement that was offered, would you, in effect, penalize the attorney and his client for not having accepted the settlement in the first instance? That is, do you value the time, on an hourly basis, less from the moment of a settlement offer to final adjudication than you did up to the moment of settlement?

Judge RYMER. I think it is an appropriate factor to consider, along with all of the other factors that in the Ninth Circuit we are obliged to consider in awarding attorneys' fees, and whatever that is, it is as appropriate in a corporate case as it is in a civil rights case.

The CHAIRMAN. Can you tell me why it is appropriate? If it is a constitutional claim and you acknowledge that the economic value of the claim is not the relevant factor, why would it be appropriate?

Judge RYMER. Well, I think that the effort that goes into the case in relationship to the ultimate success is a factor which we are obliged to consider as a trial court in awarding attorneys' fees.

The CHAIRMAN. Give me an example of what would be a substantial nonmonetary outcome in a civil rights case.

Judge RYMER. If there is a request for injunctive relief, if there is a request for restructuring of some sort, that would be an example. In the *Quarter* case, there was no request for injunctive relief, nor was there any special issue of constitutional violation. It was, in effect, an ordinary case for compensation for the injury that the plaintiff believed and proved had been suffered.

The CHAIRMAN. I don't want to harp on it, but I am still confused as to the relationship between a settlement offer and rejection, and final adjudication. I mean, is there——

Judge RYMER. Well, if there were a—let us say there was a $75,000 offer of settlement.

The CHAIRMAN. Yes.

Judge RYMER. And let us say that the trial lasted for 3 weeks and produced a $2,000 verdict.

The CHAIRMAN. Yes.

Judge RYMER. I think that it is not inappropriate under the Supreme Court cases that have dealt with the issue recently and under the Ninth Circuit authority to consider the relationship between the additional effort devoted to the recovery vis-a-vis what could have accrued to the plaintiffs had the settlement offer been accepted.

And there is also a constraint of local rules and of Federal Rules of Civil Procedure with respect to the effect of costs and fees incurred before settlement and after a settlement, and that had been documented in that case, as I recall it.

The CHAIRMAN. Well, I will leave that for a moment.

Judge, your record shows that you have heard several civil rights cases filed by *pro se* plaintiffs. In your view, how should the court treat *pro se* plaintiffs?

Judge RYMER. I am sorry. How should a court——

The CHAIRMAN. How should they? I beg your pardon.

Judge RYMER. With exactly the same consideration, fairness, openness, impartiality, and reasonness as any other litigant.

The **Chairman**. Are there any type of cases, civil rights or otherwise, in which *pro se* plaintiffs should be treated differently than a party represented by an attorney?

Judge **Rymer**. Under the law, as I understand it, in the Ninth Circuit, and I think as a matter of policy, it is appropriate to treat prisoner *pro se* complainants with somewhat more care in the sense of trying to be more helpful in assisting the way they plead the case or present it if it goes to trial.

The **Chairman**. Should the court look beyond the statutes or cases cited by a *pro se* plaintiff—for those who may read the record or who may not know, someone representing themselves—and consider the entire complaint? Should the court consider the entire complaint when making a decision; that is, look beyond the statutes and cases cited by the *pro se* plaintiff?

Judge **Rymer**. I think that one has an obligation to do that. In the face of a motion to dismiss, whether the complaining party is *pro se* or not, I believe that you should look at the entire complaint. But I am not sure that there is an obligation, whether it is a *pro se* or a represented party, to look beyond the cause of action that is actually pled in the complaint, whether it is civil rights or any other action.

The **Chairman**. Should the court advise a *pro se* plaintiff of measures that he or she could take in order to be able to proceed in your court, if you knew one? If it was clear on the face of it that as a sitting judge, the situation could be remedied by advising the *pro se* plaintiff that if you, in fact, amend your complaint to say, or if you, in fact, take the following measure you would, in fact, be able to avoid summary judgment at this moment, for example, do you have an obligation to say that as a judge?

Judge **Rymer**. With a *pro se* or represented client, on a motion to dismiss, I believe a judge has an obligation to give leave to amend if there is any legal theory on which the facts as pled can support a claim for relief.

As you know, I have authored an opinion for the Ninth Circuit in which the Circuit held that the court has no obligation to go beyond that in dealing with a summary judgment, no matter whether the party is *pro se* or represented, and I believe that it is necessary to take that position in order to be fair to both parties and not become an adversary or a lawyer for one side rather than the other and step out of the role as a judge as an impartial adjudicator.

The **Chairman**. The rationale being that the *pro se* plaintiff could have had an attorney and the fact that they don't——

Judge **Rymer**. Well, the rationale being that the judge is obliged to be fair and impartial to both sides, and once the judge steps out of that role for one side or the other, I believe that he or she is in danger of being perceived, at least, as being partial toward one side rather than the other.

The **Chairman**. Even if it is a technical deficiency that relates to the drafting of the pleading?

Judge **Rymer**. Well, of course, Senator, it depends a good deal upon what one views as a technical deficiency. If it is purely a technical deficiency, I don't believe that the courts should throw out any complaint, and I believe that cases and controversies before the Federal courts ought to be adjudicated on their merits, if possible.

The **Chairman**. Judge, a review of your opinions, including those involving civil rights claims and *pro se* plaintiffs, might lead some to see a pattern of decisions in favor of corporations or the government in general—you know, the big guy against the little guy. I am sure it is not the first time you have heard that raised.

Do you think that this would be a fair reading of your opinions?

Judge **Rymer**. Not of all of them, no.

The **Chairman**. Of any of them?

Judge **Rymer**. Well, I don't know which ones that you have read. I don't believe——

The **Chairman**. We have read them all. I think every written opinion you have, we have read, I think. And if we haven't, somebody is in trouble.

Judge **Rymer**. I would hope that anyone reading them all would believe that they had been as reasonable as possible and as open to every argument made as possible, and would hope that the reader would conclude that the positions of all sides had been fairly and thoughtfully considered.

The **Chairman**. Well, you know, I mean the kinds of things—and I will yield to my colleague in a moment, but the kinds of things that—well, I will yield now and I will come back.

Senator **Thurmond**. Thank you, Mr. Chairman.

Judge Rymer, I might ask you this question. How does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions as the Due Process or Equal Protection Clauses?

Judge **Rymer**. I believe one interprets the Constitution or the amendment by looking to the language, to the Framers' thinking, to the traditional value that is in that provision, and to the structure of the Government as established in that Constitution and, of course, to precedent, to principles of law that have already been developed that must guide and inform an intermediate appellate or trial court judge's decision.

Senator **Thurmond**. One thing that has disturbed me about some Federal judges has been judicial activism. Under our tripartite system, the Congress makes the law. The President, executive branch, administers the law, and the courts interpret the law. But some judges have gone so far as to take over school districts and prisons and hospitals and other things.

Let me ask you this. One of the criticisms of judicial activism is a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals. Do you feel this criticism is valid, and would you explain your answer?

Judge **Rymer**. Well, of course, class actions are obviously a recognized vehicle for resolving common issues of fact and law. In an individual action, it seems to me it is important to assure that the plaintiff have standing, that there be an actual case or controversy, and that the decisions be based on the record that is adduced in that particular case.

Senator **Thurmond**. I believe you have been a district judge now for about between 5 and 6 years?

Judge **Rymer**. Six years.

Senator **Thurmond**. Have you enjoyed your work? Do you like that work?

Judge **Rymer**. I love it.

Senator **Thurmond**. Do you think you will enjoy being on the circuit court now?

Judge **Rymer**. I look forward to the opportunity.

Senator **Thurmond**. I think probably one of the most enjoyable jobs in the world is to be a trial judge. You get the thrill of the courtroom. At any rate, you have a fine record and reputation to be an excellent judge, and I will be glad to support your confirmation.

Judge **Rymer**. Thank you, sir. I appreciate that.

The **Chairman**. Excuse me one moment, judge.

Judge **Rymer**. Certainly. [Pause.]

Senator **Thurmond**. When were you first nominated to the circuit court?

Judge **Rymer**. About a year ago, exactly.

Senator **Thurmond**. A year ago. Well, with our Chairman back now, I feel sure he will expedite this matter.

Judge **Rymer**. Well, it gave me the opportunity to continue to serve in a position that I love.

Senator **Thurmond**. That is all.

The **Chairman**. Thank you.

Judge, I am still a little confused about this attorneys' fee question, not because I am concerned about attorneys, but because I am concerned about the rationale behind your decision.

In one case, as I understood it—I think it was the *Quarter* case, I may be mistaken the *Hammer* case—the attorney had a contingency fee arrangement with the plaintiff, correct?

Judge **Rymer**. This was about 6 years ago, but that is correct, as I recall.

The **Chairman**. I don't imagine you have forgotten many that you were reversed on. I know I don't forget many of the mistakes I have made. I know Neal Kinnock well; I don't forget him. [Laughter.]

And I suspect you probably know the ones you are reversed on pretty well, too, and I just want to understand your thinking on this. As I understood it, there was a contingency fee arrangement. The plaintiff won. The plaintiff's counsel moved for attorneys' fees. You said, "hey, you have a contingency fee arrangement. No sense in us awarding attorneys' fees. Have your client pay you." Is that right or wrong?

Judge **Rymer**. I am not kidding; it was 6 years ago and I don't really remember it, but I don't believe that is entirely accurate. He did have a contingency fee agreement. I did award attorneys' fees.

If I recall correctly, what I said was that the contingency, the amount that he was to have gotten because of the contingency, would be taken into account in the award of attorneys' fees. As I recall it, that is what I did. If I understand it correctly, that issue may very well now be pending in front of the Supreme Court.

The **Chairman**. Assume that is what you did. What was your rationale there? Explain your rationale to me, why that would be taken into consideration. Forget that case. Why would attorneys' fees not be awarded based upon the legitimate number of hours and time that the attorney put in, on behalf of a client? Why would a contingency fee arrangement have any relationship to that award?

Judge RYMER. If I understand or my memory serves me correctly, it has been an issue on which there has been considerable disagreement as long as I have been in practice, going back to the award of attorneys' fees in antitrust cases, civil rights cases.

The CHAIRMAN. I am not arguing that you don't have a reason. I just want to know what your rationale was; that is all.

Judge RYMER. The rationale would be that you are to award a reasonable attorney's fee to compensate the attorney for the time reasonably spent. If he also gets a contingency fee on top of that, he is being more than adequately compensated, and it is, in effect, coming out of—and that that award less the contingency would adequately compensate counsel in that particular case.

The CHAIRMAN. Well, it is a little unfair to you because you don't have the case in front of you, and there are Senators who wish to submit questions in writing, Senator Kennedy, and several other members. And I will submit this question in writing.

Our recollection from the case was that the circuit said that you awarded no fees. I may be wrong about that. So since neither of us knows the case as well as we should, why don't I submit that question to you in writing, with the other questions?

Judge RYMER. I would be happy to respond.

The CHAIRMAN. I am just trying to figure out how you think; that is all. I am not making a judgment whether you should or shouldn't have awarded attorney's fees. I just want to know what makes you tick as best I can in terms of why you would have ruled the way you did.

Judge RYMER. Adequate and reasonable compensation.

The CHAIRMAN. And how, in your mind, you make the judgment of what constitutes adequate and reasonable compensation, because that is the issue.

We will submit questions to you in writing; several of my colleagues have some questions. The sooner that you get a chance to get to them, the quicker we will be able to move on your nomination in this committee.

Judge RYMER. I will be happy to respond as quickly as I get them.

The CHAIRMAN. Again, I thank you for making the trek all the way to the East, and compliment you on being the choice of two Presidents, not just one, and we will move on your nomination as rapidly as is reasonable. Thank you very much. We appreciate it.

Judge RYMER. Thank you, Mr. Chairman. Thank you, Senator.

[Pertinent information follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 11, 1989

Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is the response of Judge Pamela Ann Rymer to your written questions with regard to her nomination to be a United States Circuit Judge for the Ninth Circuit Court of Appeals.

If we can be of further assistance, let us know.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Acting Assistant Attorney General

cc: Senator Strom Thurmond
Ranking Minority Member
Committee on the Judiciary

RESPONSES OF JUDGE PAMELA ANN RYMER

FOLLOW-UP QUESTIONS BY CHAIRMAN BIDEN

1. In determining attorney's fees in a civil rights case, Hamner v. Rios, you denied the fees because of the existence of a contingent fee arrangement. You have also reduced hours and costs in civil rights cases. Hamner v. Rios and Corder v. Gates, et al.

What was your legal reasoning in Hamner v. Rios, underlying the denial of attorney's fees?

> My legal reasoning is set forth in my order in Hamner v. Rios, which is attached.

The Ninth Circuit stated that "awarding no fees under section 1988 in this case would reduce Hamner's damages by forcing him to pay counsel from that amount." Hamner, 769 F.2d 1404, 1407.

Did you consider this when making your decision?

> All of the factors that I considered and the authorities upon which I relied are set forth in my order, which is attached.

2. Judge Rymer in Corder v. Gates, et al., you stated that the case resulted in no substantial non-monetary outcome. The Corder case involved allegedly "oppressive" behavior by the police.

Is a judgment against police officers for oppressive behavior, and the imposition of punitive damages, a substantial non-monetary outcome?

> A judgment against a law enforcement officer is in itself an important statement on constitutional rights. In many civil rights actions the plaintiff seeks and is awarded injunctive relief or establishes a significant principle of law as a result of the litigation, in addition to or instead of the recovery of general or punitive damages.

3. Judge Rymer, your record shows that you have heard several civil rights cases filed by pro se plaintiffs.

Should the court advise a pro se plaintiff of the measures he or she must take in order to proceed, if the necessary measures are not stated explicitly, but instead must be inferred from the language and structure of the rules.

> The best response I can make is to refer you to the opinion in Jacobsen v. Fuller, 790 F.2d 1363 (9th Cir. 1986), which I wrote for the Ninth Circuit. It sets forth my views on

this question in that case.

4. Judge Rymer, in one of your decisions (U.S. v. Ruelas-Armenta), when sentencing the defendant, you considered acts relating to charges that were dropped, presumably in exchange for the defendant's guilty plea.

Why did you consider acts relating to dropped charges when computing the defendant's sentence, and do you think it is always appropriate to do so?

Does this affect the incentives for defendants to plead guilty?

> The best response I can make is to refer you to my opinion in United States v. Ruelas-Armenta, 684 F.Supp. 1048 (C.D. Cal. 1988), in which I interpreted and applied the Sentencing Guidelines to a situation which presented these questions. A copy of my opinion is attached. I do not believe I can properly answer whether "it is always appropriate to do so," because that question is likely to come before me as a district judge and on the Court of Appeals, if confirmed. However, I can state that the answer does depend on the precise facts presented in each case.

5. Judge Rymer, in articles and opinions, you have expressed concern, which we all share, regarding efficient judicial management. You have expressed such concern in an opinion granting summary judgment for the defendant, because the plaintiff failed to respond to the motion (Roberson v. Equitable Life Assurance Society of the United States), and in an opinion stating that an untimely response to a summary judgment motion could result in granting such a motion (Glenn Allison v. American Bowling Congress, et al).

Does your interest in efficiently managing your docket in any way affect your decisions on summary judgment motions?

> No, except in the context of applying Local Rule 7 of the Central District of California. That Rule establishes a structure for filing, opposing, and considering motions, including motions for summary judgment. Local Rule 7.9 provides that failure to file timely opposition may be deemed consent to granting of a motion, including a motion for summary judgment.

6. In your view, when is it appropriate to grant a summary judgment motion because the non-moving party has failed to respond or submitted an untimely response?

Does your assessment of the likelihood of the non-moving party's success on the merits affect such a decision?

> In the Central District of California it is appropriate under Local Rule 7.9 to grant any motion, including a summary judgment, whenever the non-moving party has failed timeously to respond. Our Local Rules provide detailed guidelines for making a motion for summary judgment and for opposing such a motion. Among other requirements, the moving party must file a Statement of Uncontroverted Facts; Local Rule 7.14.3 provides that the court assume material facts claimed and supported in that Statement to be admitted without controversy unless controverted. It is not necessary under the Local Rules or authority in the Ninth Circuit to assess the likelihood of the non-moving party's success on the merits; under the Local Rules, failure to file a Statement of Genuine Issues in opposition to the motion means that the moving party's Statement of Uncontroverted Facts is taken as true. In general it is my practice in any event to assure myself that the moving party is entitled to judgment on the papers submitted. In general it is also my practice when an untimely response is made but there is a request for reconsideration, to permit the opposition to be entertained upon payment of appropriate sanctions in accordance with Local Rule 27. This is done in order to assure compliance with the Local Rules and to further the interest of the Federal Rules of Civil Procedure in the prompt, efficient and fair administration of justice.

7. Judge Rymer, you have given a speech on RICO litigation and written opinions on RICO cases.

In your view, how difficult is it to adequately plead and establish a RICO claim.

> As lawyers and the courts have gained more experience with the statute and the law has become more settled, how adequately to plead and prove a RICO claim has become clearer.

What is your view on the recent use of RICO in white collar securities criminal cases?

> I have never tried such a case and do not believe it would be appropriate to express any view on any particular use of RICO in criminal cases, except that in general I believe it is appropriate for the Congress to

> prescribe what conduct is criminal and that it is the obligation of the courts conscientiously to interpret and apply that law.

8. Judge Rymer, you have on occasion refused to consider expert testimony.
How do you decide when to consider expert testimony?
What guidelines do you follow?

> As a trial judge I follow the Federal Rules of Evidence, particularly Rule 702, Supreme Court and Ninth Circuit precedent, persuasive rulings of other courts, and treatises such as Weinstein on Evidence. In general, the proferred expert must be qualified and must have specialized knowledge that will assist the trier of fact. Also I follow the Local Rules of the Central District of California, in particular Local Rule 9, and the Federal Rules of Civil Procedure with respect to admissibility of evidence not identified in accordance with the applicable discovery and pre-trial disclosure rules. In general, exhibits and expert opinion not exchanged under the rules pertaining to discovery and pre-trial proceedings are to be excluded unless there is a showing of manifest injustice. If such a showing is made, the proferred evidence will be received.

9. Judge Rymer, during your years of private practice, before becoming a district court judge, did you engage in pro bono activities?
If so, what were those activities?
Did any involve litigation?

> I engaged in substantial public service in education, serving on the California Postsecondary Education Commission for ten years and as its chair for four. This commitment consumed about one week of each month and represented a strong belief on my part in the value of education as an open door and in the importance of assuring the best possible access to, and quality of, education in the State of California. I never had a direct opportunity for pro bono litigation and none of my pro bono activities involved litigation. I believe attorneys have a public duty and an obligation to contribute to the public good. Each should do so according to his or her talents, and I devoted my time and such talents as I had as

best I could.

9. One of the fundamental doctrines in Anglo-American jurisprudence is the doctrine of stare decisis -- "To stand by things decided." It is a principle that counsels respect for precedent. And it is a principle that must be both firm and flexible -- firm enough so that there is stability in the law, yet flexible enough so that erroneous decisions can be corrected.

As a district court judge, you have no doubt become well familiar with the doctrine of stare decisis. Would you please state in detail your views on the subject?

In addition, could you state whether your approach to the doctrine will be any different as a court of appeals judge, should you be confirmed?

If so, please explain in detail how it will be different.

Please state your views on the standards and principles on which the Court of Appeals should rely in reconsidering a case en banc.

> I firmly believe in the doctrine of stare decisis. Stability and consistency and reasoned development in the law are vital principles of our jurisprudence. My views are the same for all judges, whether trial or appellate.
>
> Until I am more familiar with the processes and procedures of the Circuit, I have no views on the standards or principles on which the Court of Appeals should rely in reconsidering a case en banc. However, as a trial court judge I believe that consistency and clarity of the law of the Circuit is of paramount importance to the bar and bench.

Misc — attorneys fees

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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FLOYD HAMNER,
Plaintiff,
vs.
MANUEL RIOS, et al.,
Defendants.

NO. CV 81-2561-PAR

ORDER DENYING MOTION FOR ATTORNEYS' FEES

This is an action for deprivation of plaintiff's civil rights pursuant to 42 U.S.C. § 1983 and for conspiracy to deny him equal protection of the laws under 42 U.S.C. § 1985(2) arising out of the destruction of plaintiff's adobe structure by the City of Coachella. This matter was tried to a jury which returned a verdict for the plaintiff and against the City in the amount of $41,500. The jury also found certain individual defendants, John Rios, Gil Vargas, Henry [illegible], and Arthur Valdez liable for punitive damages of $100 each. On June 25, 1984, the Court denied defendants' motion for a new trial.

Plaintiff now moves for attorneys' fees pursuant to 42 U.S.C. § 1988. The Court dispensed with oral argument. Local

Rule 7.11.

In order to recover attorneys' fees, the plaintiff must be the "prevailing party." Although the term "prevailing party" has been variously defined, a typical formulation is that "plaintiff may be considered a 'prevailing party' . . . if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley v. Echerhart*, 76 L.Ed.2d 40, 50 (1983). An award of attorneys' fees rests within the discretion of the Court. *Rivers v. City of Riverside*, 679 F.2d 795, 796 (9th Cir. 1982). Although traditionally courts have considered some or all of 12 factors in exercising its discretion, *see e.g.*, *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied sub nom. Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 921 (1976), the Supreme Court has recently provided additional guidance on the issue of how to determine an attorneys' fees award. In *Hensley v. Eckerhart*, 76 L.Ed.2d 40 (1983), the Court held that the extent of a plaintiff's success is a crucial factor in determining the award. The Court indicated that the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended multiplied by a reasonable hourly rate. "This calculation provides an objective basis on which to make an initial estimate of the value of the lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where documentation of hours is inadequate, the district court may reduce the award accordingly." *Id.*

Hours Expended

Plaintiff's counsel claims he expended 170 hours working on this case. However, an examination of the evidence produced shows it to be inadequate to support counsel's claim. Plaintiff admits that he does not have accurate time records and that his estimate is based on a reconstruction of his calendar. Indeed, in his initial declaration filed on January 24, 1984, plaintiff's counsel merely states that he estimates that he spent at least 100 hours on this case. In a supplemental declaration, that estimate was increased to 138 hours of pretrial preparation plus four days (32 hours) of trial. It should come as no surprise that counsel should maintain accurate and contemporaneous billing records in a manner that will enable a reviewing court to identify distinct claims. *Hensley v. Eckerhart*, 76 L.Ed.2d 53 & nn.13 and 14.

The court does not believe that many of the tasks identified by plaintiff's counsel can be given credit. Plaintiff's counsel worked seven hours in responding to the court's dismissal of the action for failure to follow the local rules. Although plaintiff blames defendants and their counsel, the fact remains that a diligent and reasonable effort to comply would have avoided dismissal. Plaintiff's counsel submits that he spent 30 hours doing legal research. Frankly, the file does not reflect it. Although plaintiff's counsel states that he is a specialist in civil rights claims, his papers cite the most familiar cases in the most general sort of way. For example, plaintiff failed to cite *Hensley v. Eckerhart* even though it is the Supreme Court's latest statement on § 1988 and it is cited by other cases cited by plaintiff. His contentions of facts and law cite only two cases. I think that the figure of 30 hours should be reduced by two-thirds to ten hours. Plaintiff spent two hours on a proposed pretrial conference order which had to be redrafted. Those two hours should be disallowed as well as the time spent at the pretrial conference (4 hours) because of failure to comply with the Local Rules. Finally, the Court believes that because plaintiff's counsel's figures are simply estimates and not based on actual time records, the court is warranted in reducing the figure by 10%. As a result, the court considers 127 hours to be the amount of hours reasonably expended by plaintiff's counsel [170 less 3 (response to court's dismissal for failure to comply with Local Rules) less 20 (inadequate research) less 6 (inadequate preparation for pretrial conference) = 141 less 10% = 127].

Hourly Rate

Plaintiff's counsel suggests an hourly rate of $250. He presents no evidence of his customary hourly rate or the rate of other attorneys in the community with comparable skills. *Cf.* *Rivera v. City of Riverside*, 679 F.2d 795, 796 (9th Cir. 1982) ($125 hourly rate for attorneys with civil rights expertise).

Plaintiff's counsel has a contingency agreement that provides for payment of $3,500 (non-refundable retainer) plus 1/3 of any recovery if the case goes to trial. Thus, under the contingency agreement, plaintiff's counsel would receive $17,500 in fees [$3,500 plus one-third of $42,000]. Based on 170 hours claimed by plaintiff, he would receive slightly more than $100 per hour for his time. In the absence of other evidence, the Court believes that $115 per hour is a reasonable rate.

Multiplying the hours reasonably expended (125) by the reasonable hourly rate ($115) the product is $14,695.

Of course, this figure is simply the starting point. The Court can adjust this figure by considering the factors identified in Kerr v. Screen Extras Guild, Inc., supra, the most important of which is results obtained.

Level of Success

The result desired by the plaintiff, as evidenced by the complaint and the [illegible], was an injunction against the City from tearing down his property. Although plaintiff filed the complaint, he did not apply for a temporary restraining order and the City tore down the building. As a result, plaintiff was left only with a claim for damages.

The damages awarded were about $10,000 less than plaintiff's own valuation of the property. Plaintiff did achieve a level of success by this action. Moreover, it is also true that the injunctive relief sought was based on the same facts and theories as the damages claim. See Hensley v. Eckerhart, 76 L.Ed.2d at 52, n.11. Based on the time spent by plaintiff's counsel, the ultimate recovery was not modest.

Other Factors

Other factors identified in Kerr suggest that any award should be diminished rather than increased. This case presented neither novel nor difficult questions. The fundamental issues involved the notice received by plaintiff and his subsequent conduct. The parties did not raise difficult issues of valuation of property nor did they concern themselves with problems involving the taking of property. Similarly, the skill required to perform the legal services involved was not extraordinary. The case was straightforward and clear. Discovery was simple. Any delay in getting this action to trial was a result of the parties' failure to follow the Local Rules.

Moreover, this is not the type of case where plaintiff's counsel was required to expend enormous amounts of time thereby precluding him from representing other clients. Even if the court accepts the 126 hour figure as accurate, that amount of time spread over two years represents a small fraction of time available to counsel. Plaintiff also paid a non-refundable retainer which -- if the Court's estimate of hours is accurate -- covered nearly 25% of the hours that the Court finds to be reasonably expended. Thus, while the contingency agreement shows that plaintiff's counsel's recovery of fees was in some doubt, much of this was already paid for by plaintiff. A contingency fee [illegible] agreement is evidence that the potential cost of attorney's fees provided no disincentive to the assertion of rights.' Buxton v. Patel, 595 F.2d 1182, 1185 (9th Cir. 1979).

The amount of a statutory award on the above analysis could be no more than $14,660 which is less than the fee under the contingency fee agreement of $17,500. In a case similar to this one, the Ninth Circuit considered whether attorneys' fees should be awarded where the counsel has a contingency fee agreement. In Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979), the court upheld a denial of a motion for attorneys' fees where the application of the various factors in Kerr did not weigh strongly in favor of the award and there was a contingency fee agreement. Concerned about double recovery, the court left counsel and plantiff to the fee agreemet. Because the reasoning in

Buxton v. Patel remains the law of the Circuit [see Lummi Indian Tribe v. Oltman, 720 F.2d 1124, 1125 (9th Cir. 1983)], I believe that it should control this case.

IT IS THEREFORE ORDERED that plaintiff's motion for attorneys' fees is DENIED.

DATED: September 5, 1984.

Pamela Ann Rymer
United States District Judge

A status conference is hereby set for May 17, 1988, at 4:30 pm. By May 10, 1988, the parties shall file a statement regarding what issues they contend remain for determination by the Court and what further proceedings they contend are required.

IT IS SO ORDERED.

UNITED STATES of America, Plaintiff,

v.

Rosario RUELAS-ARMENTA, Defendant.

No. CR87-1027-PAR.

United States District Court, C.D. California.

May 3, 1988.

After a grand jury charged the defendant with eight counts alleging the violation of four federal statutes, the defendant entered a plea of guilty. The District Court, Rymer, J., held that: (1) the base offense level for possession of a check that had been stolen from the mail was four and, for sentencing purposes, the guidelines permitted an upward adjustment for the defendant's involvement in a scheme to steal more than $7,000 and the "more than minimal planning" that the scheme entailed, and (2) application of the guidelines did not nullify the defendant's guilty plea.

Ordered accordingly.

1. Criminal Law ⇐986.2(1)

Sentencing guidelines permitted district court and probation officer to consider all acts and omissions that were part of same course of conduct, or common scheme or plan, as offense of conviction and, therefore, consideration could be given to defendant's involvement in scheme to steal
more than $7,000 and the more
mal planning that scheme entaile
mining sentencing guidelines rar
fense of possession of stolen
amount of $468. 18 U.S.C.A. §
tencing Guidelines, §§ 1B1.3(a)(1,
comment, 3D1.2(d).

2. Criminal Law ⇐986.2(1)

Permitting district court and
officer to consider acts and omis
were part of same course of co
common scheme or plan, as offen
viction would not nullify defendan
plea to one count, as district co
decrease provisional offense leve
levels if defendant demonstrate
ance of responsibility for his act
guidelines permitted court com
range of discretion at each level.
ing Guidelines, §§ 1A4.(c), 1B
1B1.3 comment, 3E1.1.

3. Criminal Law ⇐980(1), 986.2(

In sentencing defendant on gu
to possession of check stolen fro
presence of other checks and false
cations supported addition of tw
pursuant to sentencing guideline fo
than minimal planning." Sen
Guidelines, §§ 1B1.1 comment, 1B1
2B1.1 comment, 2B1.2(b)(3)(B).

4. Criminal Law ⇐274(3)

District court's acceptance of
level of ten for defendant's posses
check stolen from mail, based on
tion of sentencing guidelines and u
adjustment for defendant's involve
scheme to steal over $7,000 and "mor
minimal planning" involved, did not
defendant to withdraw his guilty
Sentencing Guidelines, §§ 1B1.3,
3(a)(2), 2B1.1 comment, 2B1.2(b)(3)(B),
3; Fed.Rules Cr.Proc.Rule 11(e)(1)(
U.S.C.A.

Thomas H. Bienert, Jr., Asst. U.S.
Los Angeles, Cal., for plaintiff.

Joseph F. Walsh, Los Angeles, Cal
defendant.

MEMORANDUM OF DECISION

RYMER, District Judge.

The Grand Jury charged three defendants on December 23, 1987 with eight counts alleging the violation of four federal statutes. They are: 1) conspiracy, 18 U.S.C. § 371; 2) possession of stolen mail, 18 U.S.C. § 1708; 3) possession of stolen United States Treasury Check, 18 U.S.C. § 510(b); and 4) possession of a false identification document. Defendant Ruelas-Armenta was charged with three felony offenses; he pled guilty to count four of the indictment pursuant to a plea bargain agreement in which counts one and five would be dismissed. Count four charged defendant with the unlawful possession of the contents of one letter stolen from the mails. 18 U.S.C. § 1708. This letter contained a check to Eleanor Rolko for $468.00. Count one alleged the crime of conspiracy to pass forged treasury checks in violation of 18 U.S.C. § 371; Count five charged the crime of receiving and concealing one stolen Treasury check in the amount of $468.00 in violation of 18 U.S.C. § 510(b). The indictment alleges that a total of over $7,000 was stolen by all the defendants. The factual basis for the plea was that at the time of his arrest on December 8, 1987, Ruelas-Armenta knowingly processed one check in the amount of $468.00 which had been stolen from the mail.

The court's determination of defendant's sentence is governed by the new sentencing guidelines enacted pursuant to 28 U.S.C. § 994(a).[1] Under the guidelines, the base offense level for defendant's crime is a four. Guideline § 2B1.1, "Larceny Embezzlement, and other Forms of Theft." The Presentence Report added six levels because of the specific offense characteristics present in this case, four levels because the amount of the loss is between $5,001 and $10,000 and two levels because more than minimal planning was involved. The adjusted offense level therefore is ten. The sentence guideline for level ten is six to twelve months.

Defendant contends that the Presentence Report disregarded the plea agreement and level of the offense in two respects: first by including conduct other than that charged in the count of conviction and second, by determining that more than minimal planning was involved. In defendant's view, only one level should be added for specific offense characteristics; the resulting guideline range for level five should thus be zero to five months. Furthermore, defendant denies that he has a prior conviction for forgery and that he is the brother of the co-defendant.

Findings of Fact

1. Defendant was arrested on December 8, 1987 when Los Angeles Police Officers stopped the car in which he was riding for a routine traffic violation. After obtaining defendant's consent, the officers searched the car and discovered a black handbag that contained thirteen U.S. Treasury checks totaling $7,301 and various identification documents. The names of the payees on the checks appeared at least once as a name on the identification documents.

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[1] While both parties proceed on the assumption that the applicable Guidelines are those currently in effect (January 15, 1988 Amendments), the court notes that the offense was committed on December 8, 1987, prior to the effective date of the amendments. However none of the amendments worked a substantive change that is relevant to the issue before the court. Section 1B1.3 of the October, 1987 Guidelines (Relevant Conduct) is identical to the current § 1B1.3(a)(2) in permitting consideration of acts that are "part of the same course of conduct, or a common scheme or plan, as the offense of conviction." As the January 1988 Commentary to amended § 1B1.3 states, "This guideline and § 1B1.4 clarify the intent underlying § 1B1.3 as originally promulgated." Further, the October 1987 Commentary does not suggest that the guidelines in force at the time of the offense should be interpreted any differently from the amended guidelines. Like the current Commentary to § 1B1.3, the October 1987 Commentary contemplated consideration of relevant offender characteristics as authorized by Chapter Three (Adjustments); § 3D1.2(d) remains unchanged. Finally, the October 1987 Commentary expressly directs that "the governing standard should be liberally construed in favor of considering information generally appropriate to sentencing." October 1987 Guidelines at 1.17.

2. Defendant's photograph appeared on two of the identification cards. His fingerprints were on two of the checks.

3. The checks were stolen and the identification documents were false.

4. In an interview subsequent to the arrest, co-defendant Jose Lopez-Armenta stated to the case agent that he and defendant were brothers.

5. During the interview with the Probation Officer, the defendant denied that he had any relatives in this country. The court has not received, as yet, the information needed to resolve this conflict. The Probation Office did not rely on defendant's denial in calculating the suggested sentence, nor shall I. § 3C1.1, Commentary (e). However, whether there was a relationship may bear to a limited extent on whether there was more than minimal planning.

6. Defendant was convicted of misdemeanor forgery under the name of George Miranda in Capitola, California and was sentenced to 24 months summary probation on July 8, 1987. Defendant now denies that he has ever been convicted of a crime in either the United States or Mexico. (The Probation Office did not count the denial as a material falsehood.) The following evidence supports the Probation Office's Report and finding that defendant's criminal history places him in Category I:

a) photographs and fingerprints of "George Miranda" sent from the Capitola Police Department match those of defendant;

b) defendant initially volunteered the information about this earlier arrest to the arresting agents.

7. The Assistant United States Attorney states that his office has photographs of defendant cashing checks while using false I.D. not associated with this case. These photographs were not turned over to defendant prior to sentencing.

Specific Offense Guideline Range

In adding the six levels to the base number, the Presentence Report considered information outside that alleged in the charge (count four) to which defendant
pled guilty. Although count four
the possession of a single stolen
the amount of $468.00, the Report t
account the entire amount ($7,031)
in the 13 checks charged in the Ind
The adjustment so determined ad
levels to the base offense level. G
§ 2B1.1. The Report also took
count that defendants had false id
tion in their possession to furt
scheme, concluding that this co
"more than minimal planning" add
levels. Guideline § 2B1.2(b)(3)(B).
graphs of defendant negotiatin
checks with false I.D. supports th
tion officer's assessment.

Defendant argues that the cour
consider facts outside those inhere
count of conviction or those stipula
the time of the plea in determi
guideline range. To do otherwis
ignore that defendant and the gov
entered into a plea bargain in w
other two counts would be dismiss
effect, according to defendant, wo
render plea bargains a nullity a
wreak havoc with important policie
the guidelines.

The language of the Guidelines
does not support defendant's positi
basic instructions for determining t
cable guideline are in Guideline
The first step is to "apply the
guideline section in Chapter Two
Conduct) most applicable to the of
conviction." § 1B1.2(a) Both
agree that § 2B1.1 is the most a
section. The second step is to d
the appropriate guideline range ir
ance with § 1B1.3 (Relevant (
The Probation Office considered t
tional information under § 1B
This sub-section allows the court t
er all acts and omissions that occu
ing the offense of conviction. The
ment contends that the informati
the $7,000 and the planning is co
this provision because the othe
checks and false identification we
in the car with the defendants w
were arrested. Government's Res
4. It is unnecessary, however, t

whether non-charged acts may be considered under § 1B1.3(a)(1) because in this case they are relevant under § 1B1.3(a)(2).[2]

[1] Subsection 1B1.3(a)(2) states that determination of the guideline range solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, shall be based on "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Crimes, such as defendant's, that fall under § 3D1.2(d) are therefore governed by § 1B1.3(a)(2). The commentary to this sub-section notes that, " 'Such acts and omissions,' as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable. This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to § 3D1.2(d); *multiple convictions are not required.*" Guidelines at 1.18 (January 15, 1988) (emphasis added).[3] Based on the evidence before the court, defendant aided and abetted the scheme to negotiate the other checks such as to warrant consideration of the entire course of conduct under subsection (a)(2). Defendant argues that the plea bargain should nullify the relevance of the conduct relating to the other offenses. The commentary does not support this position. It states:

> However, the applicability of subsection (a)(2) does not depend on whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they are part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction.
>
> Guidelines at 1.19 (January 15, 1988).

So while the conduct regarding the other checks is not contained in the count of conviction, that absence is not a bar to its consideration under subsection (a)(2).

[2] This view does not, as defendant contends, violate important policies behind the guidelines. The guidelines are not intended to effect significant changes in plea bargain practice. Guideline § 1A4.(c). Defendant argues that allowing the court to consider the additional information does effect a significant change by rendering "the whole purpose of plea bargaining null and void." Defendant's Position Paper at 8.

However, while permitting the consideration of additional information might decrease the incentive to plea bargain in certain cases, it should not in most cases destroy all incentives. First, the court can always decrease the provisional offense level two levels if the defendant demonstrates acceptance of responsibility for his actions. Guideline § 3E1.1. Although a guilty plea is neither necessary nor sufficient to obtain this reduction, as a practical matter it will often help. Second, within each offense level the guidelines still permit the court a considerable range of discretion. For example, in this case the guideline range for level ten is six to twelve months. In percentage terms this range is large and allows the court to consider leniency if it is indicated. Moreover, between offense levels there is often considerable overlap. For example in this case, plaintiff's construction would result in a guideline range of 0–5 months (for level 5 apart from any adjustment for planning), whereas to consider relevant conduct in addition to the count of conviction results in a range of 2–8 months (for level 8 apart from any adjustment for planning). Thus there is a four month overlap. (Similarly, if a planning adjustment is made, the ranges for level 8 compared with level 10 would have a two month overlap from 1–7 to 6–12.) Third, the amount of any fines imposed on the defendant could be influenced by a guilty plea and the subsequent dismissal of additional charges. Fourth, the statutory maximum is often decreased by the dismissal of other charges. Moreover, the destruction of any incentive to plea bargain in certain cases does not appear sufficiently to defeat the goals of the guidelines so as to impel this court to ignore the reasonably clear language of the guidelines and their accompanying commentary. Accordingly, the court finds that § 1B1.3(a)(2) permits this court and the probation office to consider both defendant's involvement in a scheme to steal over $7,000 and the more than minimal planning that the scheme entailed.

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[2] The court does note that the commentary to the guidelines employs the following example to illustrate the difference between information that affects the selection of the offense level and that which can influence the court once the level is determined: "For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was *not taken into account by the guidelines* would provide a reason for sentencing at the top of the guideline range." Guidelines at 1.20 (January 15, 1988) (emphasis added). However, robbery is, unlike the instant charge, covered by § 1B1.3(a)(1).

[3] The commentary to the section on the "Significance of Commentary" states that courts will (i.e. should) treat "the commentary much like legislative history or other legal material that helps determine the intent of the drafter." Guidelines at 1.22 (January 15, 1988). Changes or additions in the commentary since its submission to Congress are not intended to effect substantive changes in the application of the guidelines. Guidelines "Letter of Transmittal."

Minimal Planning

[3] The Presentence Report added two levels because the offense involved "more than minimal planning." § 2B1.2(b)(3)(B). Under the guidelines this phrase means:

> more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense.
>
> 'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. *Consequently, this adjustment will apply especially frequently in property offenses.* § 1B1.1, Commentary (f) (emphasis added).

The Commentary to § 2B1.1 further states, "The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof." Guidelines at 2.16 (emphasis added). The presence of other checks and false identifications support the addition of the two levels under 2B1.2(b)(3)(B).[4]

Withdrawal of Plea

[4] Defendant believes that the acceptance by the court of an offense level of ten should allow him to withdraw his guilty plea. He cites § 6B1.3 in support of this view.[5] This section allows the withdrawal of a guilty plea whenever the court rejects the agreement pursuant to Fed.R.Crim.P. 11(e)(1)(A). This section is not applicable in the present case because the court did not and does not reject the agreement: counts one and five of the indictment will be dismissed at the time of sentencing. Even an unexpectedly long sentence does not provide grounds for a change of plea.

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[4] Defendant objects to the consideration of the photographs of defendant negotiating checks because the photographs were not revealed to defendant and his counsel prior to the plea bargain. The court does not reach this contention because the existence of additional false identification found at the time of the arrest is sufficient to support the imposition of two levels for more than minimal planning.

[5] In this connection it should be noted that § 6B1.4 provides for a plea agreement to be accompanied by a written stipulation of facts relevant to sentencing, which can include the relevant facts and circumstances of the actual offense conduct and offender characteristics. None was proferred in this case. In any event the court is not bound by such a stipulation, but may determine the facts relevant to sentencing with the aid of the presentence report. § 6B1.4(d).

in his action challenging confiscation and dismantling of tabloid newspaper racks in that pro se litigants in ordinary civil cases should not be treated more favorably than parties with attorneys, imposing obligation to give notice of evidentiary standards would invite undesirable, open-ended participation by court in summary judgment process and notice requirement should be enacted through formal rule amendment, rather than piecemeal adjudication. Fed. Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Federal Civil Procedure ⚷2539

Affidavit submitted by pro se litigant in action challenging city council's dismantling and confiscation of newspaper racks failed to raise genuine issue of fact with respect to whether assistant city attorney had knowledge of, or ordered, authorized, or participated in actions alleged in complaint. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

Harlan L. Jacobsen, in pro. per.

Donald O. Loeb, Asst. City Atty., Scottsdale, Ariz., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before DUNIWAY, and REINHARDT, Circuit Judges and RYMER, District Judge.**

RYMER, District Judge.

This case was brought by Harlan L. Jacobsen against the City of Scottsdale and six city council members as well as against Scottsdale's Mayor, William Jenkins; the City Attorney, Richard Filler, and Donald Loeb, an Assistant City Attorney. The complaint, which alleges that the dismantling and confiscation of Jacobsen's newspaper racks violates 42 U.S.C. § 1983, is only a single chapter in the parties' protracted struggle over the marketing of the semimonthly tabloid newspaper "Single Scene." During the course of the feud, Jacobsen has been represented by counsel on a number of occasions, and he retained legal counsel in the early stages of the present dispute. Jacobsen elected to represent himself at the time he filed the complaint, however, and he has continued to appear *in propria persona* throughout.

Jacobsen raises two issues on appeal. First, he contends that the district court committed error when it granted the city council members' motion for partial summary judgment because of his failure to file any response to the motion. Second, he argues that granting Loeb's motion for summary judgment was inappropriate in that the motion raises genuine issues of material fact not susceptible of resolution under Fed.R.Civ.P. 56. Because we believe that both summary judgement motions were properly granted, we affirm.

I. *The City Council's Motion*

[1] On July 3, 1980, the six Scottsdale city council members moved for partial summary judgment and noticed the motion for hearing under Arizona Local Rule 11(e).[1] In support of their motion, the defendants filed a "Rule 11(h) statement"[2]

** Honorable Pamela Ann Rymer, United States District Judge, Central District of California, sitting by designation.

[1] Arizona Local Rule 11(e) [later redesignated as Local Rule 11(f)] provides in pertinent part:

> Any party desiring oral argument shall file with his motion or response a notice to that effect setting forth therein the date, time, and courtroom for the hearing. The time of the hearing shall be such as to give each party sufficient time to comply with this Rule and to allow the Court at least five (5) days additional prior to such hearing.

[2] Arizona Local Rule 11(h) [now Local Rule 11(i)] states in part:

> Any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts on which he relies in support of his motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific portion of the record where the fact may be found (i.e., affidavit, deposition, etc.). Any party opposing a motion for summary judgment must comply with the foregoing in setting forth the specific facts, which the opposing party asserts, including those facts

setting forth the specific facts upon which they intended to rely and the evidence in the record which supported their claim. Jacobsen did not respond to the motion with a written opposition, nor did he submit admissible evidence as required by Local Rule 11(h) and Fed.R.Civ.P. 56(e). However, he contends that he did not know that he had to do these things.[3] Urging that rules applicable to *pro se* prisoners should be extended to all *pro se* litigants, *see, e.g., Moore v. Florida*, 703 F.2d 516 (11th Cir. 1983); *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir.1975); *Hudson v. Hardy*, 412 F.2d 1091 (D.C.Cir.1968), Jacobsen argues that it was the district court's duty to advise him of the measures he should take to oppose the defendants' motion; and that it was unfair to enter summary judgment without having done so.

We reject Jacobsen's argument, for a number of reasons. First and foremost is that *pro se* litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record. Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses [4] *himself* as legal representa-

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which establish a genuine issue of material fact precluding summary judgment in favor of the moving party.

[3] Jacobsen appears to make two separate arguments in defense of his failure to respond: first, that as a litigant *in forma pauperis* he should have been notified of Rule 56's requirement that he file affidavits or other evidentiary matter; and second, that he reasonably relied upon the setting of oral argument in the case to conclude that he would be able to put on evidence at the time of the hearing.

[4] It is the element of "choice" which most clearly distinguishes the *pro se* prisoner cases from the suit at bar. The leading "fair notice" prisoner case, *Hudson v. Hardy*, first acknowledged that "in the ordinary civil case, appellant's failure to respond by affidavit might have warranted the entry of summary judgment against him." *Hudson*, 412 F.2d at 1094. However, *Hudson* concluded that an exception should be made for a prisoner unrepresented by counsel who, because of the "handicaps ... detention necessarily imposes upon a litigant," probably would be unable to retain counsel even if he had the financial means to do so. *See id.* (quoting *Phillips v. United States Board of Parole*, 352 F.2d 711, 713 (D.C.Cir.1965)). The large numbers of published decisions involving prisoners appearing *in forma pauperis* support the conclusion that an inmate's choice of self-representation is less than voluntary, and, when that unwilling self-representation is coupled with the further obstacles placed in a prisoner's path by his incarceration—for example, his limited access to legal materials, *Moore*, 703 F.2d at 520, and to sources of proof, *Hudson*, 412 F.2d at 1095—it seems appropriate to apply the requirements of the summary judgment rule with less than "strict literalness." *Hudson*, 412 F.2d at 1094.

The dissent would extend *Moore*; *Roseboro*; *Ham v. Smith*, 653 F.2d 628 (D.C.Cir.1981); and *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir.1982)—all cases involving *pro se* prisoner litigants—to ordinary civil actions and argues that those cases, with the possible exception of *Ham*, were not confined to *pro se* prisoner plaintiffs. The District of Columbia Circuit in *Ham* explicitly addressed itself to the unique problems of prisoner *pro se* litigants. "[A] pro se imprisoned litigant suffers handicaps that may impair the effective prosecution of his claim. A pro se plaintiff, upon his release from prison during the course of litigation, is likely to be saddled with similar handicaps and therefore should receive an explanation of the risks attending failure to respond to a summary judgment motion." *Ham*, 653 F.2d at 630. *Lewis* and *Moore* also addressed these unique handicaps and premised their analyses on these handicaps. "Pro se prison inmates, with limited access to legal materials, occupy a position significantly different from that occupied by litigants represented by counsel." *Moore*, 703 F.2d at 520; *see also Hudson*, 412 F.2d at 1094 ("[w]e have recognized ... that the requirements of the summary judgment rule may not fairly be applied 'with strict literalness' to a prisoner unrepresented by counsel and subject to the 'handicaps * * * detention necessarily imposes upon a litigant.'" (quoting *Phillips*, 352 F.2d at 713)). In *Lewis*, 689 F.2d at 102, the Seventh Circuit noted

> It would not be realistic to impute to a prison inmate (unless, like the 'former law professor' of whom this court spoke in *Maclin v. Freake*, 650 F.2d 885, 888 (7th Cir.1981) (per curiam), the prisoner has legal training) an instinctual awareness that the purpose of a motion for summary judgment is to head off a full-scale trial by conducting a trial in miniature, on affadavits, so that not submitting counter affadavits is the equivalent of not presenting any evidence at trial.

While *Roseboro* did not explicitly address the peculiar problems faced by prisoner *pro se* litigants, that was a one-page, *per curiam* opinion that cited *Hudson*, 412 F.2d at 1094, which did address itself to these unique difficulties.

tive should be treated no differently.[5] In both cases, the remedy to the party injured by his representative's error is to move to reconsider or to set aside;[6] it is not for the trial court to inject itself into the adversary process on behalf of one class of litigant.[7]

Imposing an obligation to give notice of Rule 56's evidentiary standards would also invite an undesirable, open-ended participation by the court in the summary judgment process.[8] It is not sensible for the court to tell laymen that they must file an "affidavit" without at the same time explaining what an affidavit is; that, in turn impels a rudimentary outline of the rules of evidence.[9] Unlike the conversion of a 12(b)(6) motion into a motion for summary judgment, which only requires notice of what the motion now is,[10] Jacobsen's pro-

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[5] As the court put it in *United States v. Pinkey,* 548 F.2d 305 (10th Cir.1977):

> The hazards which beset a layman when he seeks to represent himself are obvious. He who proceeds *pro se* with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an "advocate" for or to assist and guide the *pro se* layman through the trial thicket.

548 F.2d at 311. *See also Dozier v. Ford Motor Co.,* 702 F.2d 1189, 1194 (D.C.Cir.1983); *Birl v. Estelle,* 660 F.2d 592, 593 (5th Cir.1981); *Barnes v. United States,* 241 F.2d 252 (9th Cir.1956).

[6] Outside the bounds of the lawsuit, parties with retained counsel also may have the remedy of a malpractice action. However, such a suit does not entirely compensate for loss of the opportunity to obtain redress on the merits, particularly where, as here, the *pro se* litigant seeks declaratory or injunctive relief.

[7] Besides favoring unrepresented litigants over badly represented ones, Jacobsen's suggestion would require the trial court to help one side to a lawsuit rather than another solely because of the status of their legal representation. Doing so necessarily implicates the court's impartiality and discriminates against opposing parties who do have counsel.

[8] This problem has not been addressed in the *pro se* prisoner cases. The most explicit description of what constitutes "sufficient" notice may be found in *Roseboro v. Garrison,* 528 F.2d 309, 310 (4th Cir.1975), which states that the litigant should "be advised of his right to file counter-affidavits or other responsive material and alerted to the fact that his failure to so respond might result in the entry of summary judgment against him." However, it is not clear from the opinion whether the notice need consist of little more than that statement (*e.g.,* "you are advised that Rule 56 requires you to file counter-affidavits or other admissible evidence if you wish to oppose the motion; and the failure to do so will result in the entry of summary judgment against you"); or whether it is necessary to give a somewhat fuller explanation of "counter-affidavits" and "other admissible material"; or whether the notice should vary depending upon the court's assessment of the litigant's knowledge and intelligence.

[9] For example, Jacobsen apparently intended to offer only his own testimony as evidence, and there is no showing that he had any personal knowledge of the city council members' participation in the scheme (indeed, the later summary judgment motion involving Loeb suggests that he did not).

[10] Because the notice requirement found to be implicit in the last sentence of Fed.R.Civ.P. 12(b)(6) merely requires the court to "notice" the motion the way the parties usually do under Rule 56(c), and because Jacobsen was given specific notice that it was a summary judgment motion, cases such as *Garaux v. Pulley,* 739 F.2d 437 (9th Cir.1984) and *Davis v. Zahradnick,* 600 F.2d 458 (4th Cir.1979) do not apply to the present case. We note also that Garaux, who appeared in pro per, was at the time a prisoner at San Quentin Prison. To require that the notice of Rule 12(b) (which must be applied to all parties and which admittedly is a "highly technical requirement[ ]" of the federal rules, *Garaux,* 739 F.2d at 439) be even more stringently construed in the case of a *pro se* litigant who may be unschooled in law, does not implicate the court's impartiality as would a requirement that the court school one side in the techniques for opposing a motion for summary judgment.

The dissent also cites *Borzeka v. Heckler,* 739 F.2d 444 (9th Cir.1984); *Sherman v. Yakahi,* 549 F.2d 1287 (9th Cir.1977); *Hansen v. May,* 502 F.2d 728 (9th Cir.1974); and *DeWitt v. Pail,* 366 F.2d 682 (9th Cir.1966) for the proposition that courts have a duty, recognized by this Circuit, to ensure that *pro se* litigants do not lose their right to a hearing due to their ignorance of technical procedural requirements. These cases are inapposite for similar reasons. In *Borzeka,* 739 F.2d at 447, we held that failure to comply with Fed.R.Civ.P. 4(d)(5)'s personal service requirement

> does not require dismissal of the complaint if (a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the

posal requires advice as to what the motion must *mean*. To give that advice would entail the district court's becoming a player in the adversary process rather than remaining its referee.

Finally, even if a substantive notice requirement were desirable, it should be enacted through formal amendment rather than piecemeal adjudication. Rule 56's separate notice provision (*compare* Rule 56(c) *with* Rule 6(d)) and description of summary judgment (*compare* Rule 56(e)[11] *with* Rule 12(b)) indicate that the Supreme Court and its Advisory Committee have considered the special problems raised by the summary judgment procedure and, by failing to require specific notice of the nature of summary judgment, have concluded that the present federal rules (particularly when amplified by local rules such as Arizona Local Rule 11(h))[12] already apprise litigants of their summary judgment obligations. Requiring additional notice to *pro se* litigants would be an accretion onto Rule 56(c), not an interpretation of it;[13] and as an ad hoc amendment it would not be standardized, codified, or subject to collective decision making.

For all of these reasons, we decline to extend the *Hudson* rule and conclude that the district court did not have to inform

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> failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed.

Regarding the third factor, it was noted that "appellant was proceeding *pro se* when the defective service was made. We are generally more solicitous of the rights of *pro se* litigants, particularly when technical jurisdictional requirements are involved." *Id.* at 447 n. 2. Again, merely taking the *pro se* status of litigants into account in determining compliance with technical pleading or procedural rules does not require the district court to inform the litigant of *how* to comply with the federal rules rules regarding service. *Sherman* simply stated that the liberal pleading requirements set out in *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957) in a motion to dismiss for failure to state a claim apply with even greater force when the complaint is by a *pro se* litigant. *Sherman,* 549 F.2d at 1290; *accord, Hansen,* 502 F.2d at 730; *DeWitt,* 366 F.2d at 685. These holdings likewise do not require the district court to *instruct* litigants on proper pleading.

[11] Rule 56(e) states:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.
>
> Sworn or certified copies of all papars or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.
>
> If he does not so respond, summary judgment, if appropriate, shall be entered against him.

This rule, which was referred to by the number in the council's moving papers, makes it clear that (1) the failure to respond will result in the entry of summary judgment against the nonmoving party; (2) the response must set forth specific facts, either by way of affidavit or by the other means specified in the rule (depositions, answers to interrogatories, sworn or certified copies of papers); and (3) the affidavits must be based on personal knowledge and be admissible in evidence.

[12] The provisions of Local Rule 11(h) make it impossible to conclude that Jacobsen reasonably believed that he did not need to file a written response. The rule states that any party moving for summary judgment "shall set forth separately from the memorandum of law, and in full, the specific facts on which he relies;" that "the specific facts shall be set forth in serial fashion and not in narrative form;" and that "as to each fact, the statement shall refer to a specific portion of the record where the fact may be found." The rule then provides that "any party opposing a motion for summary judgment must comply with the foregoing." Jacobsen was apprised of Local Rule 11(h) through the council's filing of their "Rule 11(h) statement"; by its terms the rule makes it clear that he had to file a written statement of facts in opposition to the motion.

[13] This is another important way in which the present case differs from the cases construing the notice required by Rule 12(b)(6) and 56(c). Those decisions simply interpret the meaning of Rule 12(b)(6)'s requirement of "reasonable opportunity"; Jacobsen's proposal has no basis in the language of any federal rule.

Jacobsen of the need to file affidavits or other responsive matter before granting summary judgment against him.

II. *Loeb's Motion*

[2] On September 8, 1983, defendant Donald Loeb moved for summary judgment and filed an affidavit stating that he had no prior knowledge of, nor did he order, authorize, or participate in the actions alleged in the complaint. Jacobsen responded with three affidavits, one his own and two from attorneys who had worked for him. The district court granted the motion in a minute order filed November 14, 1985; Jacobsen appeals on the ground that his counteraffidavits create a genuine issue of triable fact as to Loeb's participation in the alleged events.[14]

Summary judgment under Rule 56 is not appropriate where genuine issues of material fact remain to be tried. *Occidental Engineering Co. v. INS*, 753 F.2d 766, 770 (9th Cir.1985); *see generally* Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact," 99 F.R.D. 465 (1984). In this case, Jacobsen's affidavits fail to raise such an issue. Jacobsen's allegations that Loeb was involved in prior litigation with him and that Loeb threatened him with further action do not show that Loeb actually was involved in or knew about the confiscation of the newsracks. The same can be said for attorney Moen's statement that he had negotiated with Loeb after the first and before the second incident; even if true, Loeb's knowledge of Jacobsen's complaint does not raise a genuine issue whether Loeb knew about the subsequent actions of other city employees. Finally, Jacobsen's deposition testimony about what he read in a newspaper article (not introduced into evidence) and what his attorneys told him is not based on personal knowledge and is inadmissible hearsay. Therefore it fails to raise a genuine issue sufficient to withstand summary judgment.

Accordingly, the entry of summary judgment against Jacobsen and in favor of the city council members and Donald Loeb is AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

The majority's refusal to recognize the right of *pro se* litigants to be adequately informed of their procedural obligations prior to the entry of summary judgment against them rests on several false factual assumptions and on an inaccurate interpretation of the law of this and other circuits. Because I believe that our previous cases recognize the rights of *all pro se* litigants to the procedural protection of the court, and because I believe that affording such protection serves the interest not only of the litigants but also of the court itself, I respectfully dissent.

The majority opinion creates two classes of indigent litigants, those who are poor and law abiding, and those who are poor and not. It then affords lesser rights and protections to the former. In this respect, the majority's actions are contrary to the view our circuit has previously expressed. Moreover, its opinion rests on two false factual assumptions: that *pro se* status is voluntary and that the appellant in this case received adequate notice of his obligation to respond in writing to appellee's summary judgment motion. I address each assumption in turn.

The majority portrays a litigant's *pro se* status as the product of choice, whereas such status is most often the result of necessity. The majority equates a litigant's so-called "choice" to appear *pro se* with other litigants' choice of counsel. The comparison ignores the economic reality that lies behind most *pro se* appearances. Given the disparity in legal skills and knowledge that exists between a layman and a lawyer, few litigants will "choose" to prosecute or defend a suit without representation if they are able to hire a lawyer.

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[14] Jacobsen also contends that summary judgment was inappropriate as a matter of law because (1) Loeb was part of a conspiracy to deprive Jacobsen of his constitutional rights, and (2) he had an affirmative duty to advise other city employees that they should not pursue their course of action. However, conspiracy is not alleged in the complaint, and Jacobsen has not suggested that Loeb had any control or direction over the city employees involved in the confiscation or dismantling of the newsracks. Therefore neither argument supports reversal of the district court.

Contrary to the majority opinion, appellant did not receive adequate notice of his duty to respond in writing to appellee's motion for summary judgment. Other circuits have assumed that the filing of a motion for summary judgment does not provide notice of the duty to submit documentary materials, without having explicitly analyzed the language either of Federal Rule of Civil Procedure 56 or of the relevant Local Rules. *See, e.g., Moore v. State of Florida,* 703 F.2d 516, 520–21 (11th Cir. 1983); *Lewis v. Faulkner,* 689 F.2d 100, 101–02 (7th Cir.1982); *Ham v. Smith,* 653 F.2d 628, 630–31 (D.C.Cir.1981); *Roseboro v. Garrison,* 528 F.2d 309, 310 (4th Cir. 1975). Such an analysis merely confirms that assumption, however. The responding affidavit requirement is not set out explicitly in either Fed.R.Civ.P. 56 or in Arizona Local Rules 11(e) and 11(h), but rather must be inferred somewhat obliquely from the language and structure of those rules. Although practicing attorneys can be expected to draw the proper inferences from the language of legal rules, the court can not presume that laymen possess such interpretive skills.

The Seventh Circuit in *Lewis v. Faulkner, supra,* supported its finding that a summary judgment motion in and of itself provides inadequate notice of the affidavit requirement with an analysis of "lay intuition" of civil procedure. *Id.,* 689 F.2d at 102. A layman expects that the filing of a complaint triggers an answer, after which the trial is conducted. The court refused to impute to *pro se* litigants "an instinctual awareness that the purpose of a motion for summary judgment is to head off a full-scale trial by conducting a trial in miniature, on affidavits, so that not submitting counter affidavits is the equivalent of not presenting any evidence at trial." *Id.* In the present case, not only was appellant not on notice of his obligation to submit counter affidavits, but his inference from the setting of oral argument that he would be entitled to present oral argument if he appeared in court on that date was entirely reasonable. Nothing in the calendering of oral argument suggests the existence of an undisclosed condition precedent. Appellant's appearance at court on the proper day, prepared to present his case, demonstrated his good faith reliance on the setting of oral argument as notice of the relevant legal procedure.

The majority's reading of the law is incorrect as well. This circuit recognizes that courts have a duty to ensure that *pro se* litigants do not lose their right to a hearing on the merits of their case due to ignorance of technical procedural requirements. *See, e.g., Garaux v. Pulley,* 739 F.2d 437, 439–40 (9th Cir.1984); *Borzeka v. Heckler,* 739 F.2d 444, 447 n. 2 (9th Cir. 1984); *Sherman v. Yakahi,* 549 F.2d 1287, 1290 (9th Cir.1977); *Hansen v. May,* 502 F.2d 728, 730 (9th Cir.1974); *Dewitt v. Pail,* 366 F.2d 682, 685 (9th Cir.1966). We have not restricted that protection to prisoner litigants. To the contrary, we justify the extension to *pro se* prisoner litigants of greater procedural protection than is afforded to litigants with counsel on the ground not that they are prisoners, but rather that they are unrepresented. *Cf. Sherman v. Yakahi,* 549 F.2d 1287, 1290 (9th Cir.1977) (pleadings in employee's *pro se* discrimination suit must be viewed under a less stringent standard than if drafted by lawyers) *with Hansen v. May,* 502 F.2d 728, 730 (9th Cir.1974) (habeas corpus suit) ("Pleadings drafted by laymen, proceeding *in propria persona,* are to be interpreted by the application of less rigid standards than those applicable to formal documents prepared by lawyers."). *See also, Borzeka v. Heckler,* 739 F.2d 444, 447 n. 2 (9th Cir.1984) (appeal from termination of disability benefits) ("We are generally more solicitous of the rights of *pro se* litigants, particularly when technical jurisdictional requirements are involved.").

We already require a court to advise a *pro se* litigant of its intention to convert *sua sponte* a motion to dismiss into a summary judgment motion. *Garaux v. Pulley*, 739 F.2d 437, 439–40 (9th Cir.1984). We emphasized in *Garaux* that "[d]istrict courts must take care to insure that *pro se* litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings." *Id.*, 739 F.2d at 439. The need to provide *pro se* litigants with proper notice of summary judgment procedures is just as great when the opposing party moves for summary judgment as when the court *sua sponte* converts a motion to dismiss into a motion for summary judgment, since a party's motion for summary judgment does not in and of itself provide notice of the affidavit requirement, and the risk that "enforcing" a "highly technical requirement[ ] … might result in a loss of the opportunity to prosecute or defend a lawsuit on the merits," *id.*, is identical in both procedures.

The reasoning of *Garaux* compels us to acknowledge a *pro se* litigant's right to effective notice of summary judgment procedures when the opposing party moves for summary judgment. The majority attempts unsuccessfully to distinguish *Garaux* on the ground that we there required notice only "of what the motion now *is*," whereas appellant asks us to require notice of "what the motion must *mean*," *supra*, at 1365, (emphasis in original). The distinction is artificial. In *Garaux*, we required that a *pro se* plaintiff receive "specific notice, and a fair opportunity to respond," *id.*, 739 F.2d at 440, in order to insure that such plaintiffs do not inadvertently forfeit their right to a judicial hearing. That purpose would be thwarted if the district court merely labeled the summary judgment motion as such. As the Seventh Circuit noted in *Lewis v. Faulkner*, 689 F.2d at 102, "[a] reasonable opportunity to respond [to a motion for summary judgment] presupposes notice. Mere time is not enough, if knowledge of the consequences of not making use of it is wanting." Implicit in *Garaux's* notice requirement, therefore, is a requirement that the court instruct a *pro se* litigant on the consequences of a summary judgment motion.

Other circuits have recognized that a *pro se* litigant is entitled to notice of the consequences of failure to submit evidentiary material in response to a motion for summary judgment. *See, e.g., Roseboro v. Garrison, supra, Moore v. State of Florida, supra, Lewis v. Faulkner, supra, Ham v. Smith, supra.* Although the litigants in these cases were all prisoners, the holdings are not strictly confined to prisoner litigants, with the possible exception of the D.C. Circuit. The Fourth Circuit in *Roseboro* framed its notice rule in terms of all "*pro se* plaintiff[s]." *Roseboro*, 528 F.2d at 310. The Seventh Circuit in *Lewis* discussed summary judgment procedure in terms of general "lay intuition." *Lewis*, 689 F.2d at 102. The Eleventh Circuit in *Moore* cited as "controlling" precedent a case requiring that a nonprisoner litigant be notified of the duty under a local rule to respond to a motion to dismiss. *Moore*, 703 F.2d at 520 (citing *Mitchell v. Inman*, 682 F.2d 886, 887 (11th Cir.1982)). *Moore* supported its ruling with another nonprisoner case from the Fifth Circuit requiring the district court to afford a *pro se* civil rights litigant a meaningful opportunity to remedy defects in summary judgment materials. *Id.* (citing *Barker v. Norman*, 651 F.2d 1107, 1129 (5th Cir.1981)).

The majority's fear that the impartiality of the district court would be compromised were it to notify, or require notification to, *pro se* litigants of the written response requirements of Fed.R.Civ.P. 56 is wholly without merit. A court may legitimately assume that the attorneys who appear before it have been trained in legal procedure, and may just as legitimately assume that lay litigants have not. Courts, no less than the parties to a dispute, have an interest in the quality of justice. In assuring that notice is given a *pro se* litigant of the requirements of summary procedure, the court merely redresses a categorical disparity between the parties' abilities to obtain a just resolution to their dispute. The court does not thereby "becom[e] a player in the adversary process," *supra*, at 1366, but rather ensures that the adversary process functions properly. "Summary judgment is not a catch penny contrivance to take unwary litigants into its foils and deprive them of a fair trial." *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir.1940) (quoted in *Barker v. Norman*, 651 F.2d at 1129 n. 26).

The majority's concern that a notice requirement would "invite an undesirable, open-ended participation by the court in the summary judgment process," *supra*, at 1365, is also without merit. Other circuits have trusted district courts to evaluate what form of notice is proper in light of a *pro se* litigant's capacities. *See, e.g., Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C.Cir. 1968) ("[B]efore entering a summary judgment against [a *pro se* litigant], the District Court, as a bare minimum, should [provide] him with fair notice of the requirements of the summary judgment rule. We stress the need for a form of notice sufficiently understandable to one in [the *pro se* litigant's] circumstances fairly to apprise him of what is required.") (quoted in *Barker v. Norman*, 651 F.2d at 1129 n. 26). *See also Roseboro v. Garrison*, 528 F.2d at 310 (the *pro se* litigant should "be advised of his right to file counter-affidavits or other responsive material and alerted to the fact that his failure to so respond might result in the entry of summary judgment against him.") This circuit has no reason not to likewise trust the courts below to exercise their discretion in this area appropriately.

Because I believe that both the law of this circuit and the interests of justice require that *pro se* litigants be notified of their procedural obligations under Rule 56, I respectfully dissent from Part I of the majority's opinion.

OXFORD LIFE INSURANCE COMPANY, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

No. 84–2835.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 10, 1985.
Decided May 30, 1986.

Action was brought involving claim for recovery of taxes paid in connection with reinsurance transaction entered into between taxpayer and another insurer. On cross motions for partial summary judgment, the United States District Court for the District of Arizona, 574 F.Supp. 1417, C.A., Muecke, J., dismissed taxpayer/reinsurer's suit for refund of federal income taxes paid in 1973, and granted summary judgment for Government on reinsurer's erroneous refund counterclaim for 1974. Taxpayer appealed. The Court of Appeals, Wiggins, Circuit Judge, held that: (1) reinsurer's income in an assumption reinsurance transaction includes the intangible value of the block of insurance policies required; (2) excess of reserve liability over tangible assets received was taxpayer's cost in acquiring the policies, which had to be amortized over the life of the policies; and (3) taxpayer's income did not have to be adjusted to include revaluation of reserves.

Affirmed in part; reversed in part, and remanded.

1. Internal Revenue ⟹3979

Reinsurer's income in an assumption reinsurance transaction under Life Insurance Company Income Tax Act includes the intangible value of the block of insurance policies required. 26 U.S.C.A. §§ 801–820.

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
LOS ANGELES 90012

CHAMBERS OF
PAMELA ANN RYMER

April 13, 1989

Honorable Joseph R. Biden, Jr.
United States Senate
489 Russell Senate Building
Washington, D. C. 20510-0802

Dear Senator Biden:

In lieu of my reappearance before the Judiciary Committee for further testimony in connection with my nomination, I am pleased to advise the Committee that, with regard to any communications which I had with members of President Bush's staff and members of the Justice Department who serve Attorney General Thornburgh:

(1) I did not make any commitments with regard to how I might rule on any specific case or issue nor were any such commitments sought.

(2) My personal views on controversial cases or issues were not solicited in a manner to suggest that it should commit myself to rule in a particular way on issues or cases to advance my nomination.

(3) I do not believe that I have been subjected to an "ideological litmus test."

(4) I have no doubt that everyone with whom I talked expected me, if nominated and confirmed, to exercise my best independent judgment on every matter brought before me.

Sincerely,

Pamela Ann Rymer

LAW OFFICES
YAGMAN & YAGMAN, P.C.
10880 WILSHIRE BOULEVARD, SUITE 1900
LOS ANGELES, CALIFORNIA 90024
(213) 475-4988

APR 20 1989
New York

Lorraine E. Waller
Investigative Counsel
Committee on the Judiciary
United States Senate
Washington, D.C.

Re: Nomination of Hon. Pamela Ann Rymer

Dear Ms. Waller:

This letter is written in response to your April 17, 1989 letter to me in which you invite me to submit written testimony in support of the nomination of Hon. Pamela Ann Rymer. Here is my testimony:

I am a member of both the New York and California Bars, and practice exclusively in the area of federal civil rights litigation dealing with police misconduct litigation under 42 U.S.C. 1983. I almost always represent plaintiffs in such actions against the police. I have personally been lead counsel in over 100 such cases in the federal courts, and have been lead counsel in over 50 appeals in civil rights cases. I am attaching a copy of my resume to detail my experience further.

I have appeared before Judge Rymer with some regularity since the time she took the bench as a United States District Judge, and have appeared before her only as counsel for plaintiffs in suits against police for alleged misconduct. My comments about Judge Rymber are based on numerous appearances before her, including four jury trials.

On every occasion on which I have appeared before Judge Rymer, she has demonstrated exceptional intelligence, excellent knowledge of all applicable law, and an ability to be fair to all. She also is courteous, pleasant, and has a well-developed sense of humor. In short, as a judge, she is one on whom I often wish other judges would model themselves.

Judge Rymer and I are miles apart politically and philosophically: I perceive her to be what I call a "young republican," and that is one of the worst things I call people. I am an unreconstructed 60's liberal. As between other people, those differences might, and do, create problems. There are a number of federal judges here in Los Angeles who are just awful, in every way. Some are stupid; some are intelligent, but lacking in humanity; and yet others are both. Yet others are results-oriented, and make their decisions based on the direction in which they want a case to proceed, and whom they want to win. With respect to Judge Rymer, who is highly intelligent and possesses humanity, I know of no attorneys on my side of the field who do not appreciate and like to appear before her except some few who are either not particularly intelligent, or who are lazy.

I have read in the local legal newspaper that some questions have been raised with respect to Judge Rymer having cut-down or refused to award attorneys' fees to prevailing plaintiffs' attorneys in civil rights cases. I am familiar with those decisions, and with the decision by the Ninth Circuit in Hamner v. Rios, one of those cases. Judge Rymer cut-down attorneys fees to me in one case by, I believe, 20%. I did not like that, but her decision very obviously was one made on what she considered to be the merits and the law. I have appealed her decision. It does not affect my evaluation of Judge Rymer.

One thing about Judge Rymer that I have observed makes her especially qualified to sit on the Ninth Circuit. She is one of the few judges on the district court who tenders full-blown written tentative rulings to counsel who appear before her on law and motion matters. These rulings, like her published opinions, are excellent in the absolute sense and in the sense that they are very helpful to counsel.

I suspect that Judge Rymer will be confirmed to sit on the Ninth Circuit, and my only regret will be that this office will not have as many cases before her, and that possibly she will be replaced by someone who is not as terrific a judge as she is. (Who replaces her will be a much more important decision for you than is your decision to confirm her.)

Judge Rymer should be swiftly confirmed, and you should not make her case the test case for how the White House screens judicial nominees: there is no way in the world that Judge Rymer would have told anyone how she might rule on any issue that might come before her, no matter who asked her.

Sincerely,

STEPHEN YAGMAN

The CHAIRMAN. Our next witness, who is, again, already sworn, is Mr. Robert C. Bonner. Mr. Bonner, would you come forward? And I remind you, as I said, you are already sworn. Mr. Bonner, you had a very glowing introduction from our colleague, but I want to raise a few questions with you. And I don't doubt anything he said, and you have testified before this Congress before and we welcome you back.

Mr. Bonner, there have been some who have suggested that you have sought to unduly generate publicity. I know this is not the first time you have heard it; you have read it in the paper, about some of the cases prosecuted during your tenure as U.S. attorney.

One such allegation arose in the Richard Miller spy case. Mr. Miller's attorney, Stanley Greenberg, while praising your overall performance as U.S. attorney, has said that you used your frequent news conferences to advantage for the prosecution. He added that by holding a press conference, you were, "conveying to the jury pool the prosecution's view of the case and, frequently, the evidence."

In addition, in March 1988, a Los Angeles Times newspaper article reported that as U.S. attorney, you hired a full-time public relations person, quoted coverage of cases from national news outlets like "60 Minutes," and held news conferences almost twice monthly.

How would you respond to these statements, charges, and characterizations, of generating undue publicity?

TESTIMONY OF ROBERT C. BONNER, PASADENA, CA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Mr. BONNER. Well, first of all, Mr. Chairman, I appreciate the opportunity of being here. I would like to, if I could, before I respond to both of those questions to recognize my wife, Kimi, of almost 20 years.

The CHAIRMAN. I apologize, I apologize. I am sorry.

Mr. BONNER. She might stand.

[Ms. Bonner stood.]

The CHAIRMAN. Welcome.

Mr. BONNER. She is my cheering section, I guess, today.

With respect to that criticism, first of all, I am the U.S. attorney for what is the most populace Federal district in the country. Actually, I think Senator Wilson indicated 10 million, but according to, I think, the 1988 census, the Central District of California has a population of 14 million.

The CHAIRMAN. He is thinking of the bay area.

Mr. BONNER. And not surprisingly, as U.S. attorney, I have been very active in terms of major narcotics prosecution, money laundering cases, white collar crime. So, by definition, I think that it is safe to say, at least in Los Angeles, that some of those cases generate some media interest.

We indict about 1,500 defendants, give or take some, on an annual basis. My estimate is that with respect to press conferences announcing indictments that we are probably talking about 20, maybe 2 dozen, a year of the 1,500 or so defendants that are indicted by my office, or indicted by the grand jury.

The CHAIRMAN. I beg your pardon. How many?

Mr. BONNER. I would estimate about 20, perhaps 24, total.

The CHAIRMAN. That is consistent with what they say.

Mr. BONNER. The only announcement that is made—this is true of the case of *United States* v. *Richard Miller* and it is true of any case in which there is an announcement by press conference—the only announcement that is made, first of all, is at the time the indictment is filed or returned by a Federal grand jury in my district.

There is no subsequent announcement; there is no continual talking to the media. There is one announcement, and under the policies that I have established which I think are consistent with the regulations of the Department of Justice and the standards of professional conduct for a prosecutor, the announcement with respect to an indictment is limited by me to the allegations that are contained in the indictment, the substance of those allegations, and other appropriate matters, such as, if convicted, what the maximum sentence would be provided under Federal law, an anticipated date of arraignment, and that kind of thing, if there is one.

There is no announcement after that. In fact, it is my policy that neither I nor any member of my office will make any comment whatsoever to the media with respect to the merits of a case or anything about the substance of the case until after there has been a trial and a result in that trial by conviction or acquittal or whatever it is.

In the *Miller* case, in particular, there was a press conference, although that press conference was not called by me. Given the particular and peculiar nature of that particular case involving, as it did, the first FBI agent ever charged, or for that matter, convicted of espionage, given the fact that it was an extensive FBI investigation into the case, the special agent in charge at the FBI at the time requested and discussed with me whether the FBI SAC, or special agent in charge, in Los Angeles could hold a press conference.

Because of the nature of that case, involving as it did an FBI agent, I acceded to his request. I participated in it. I also met with the FBI SAC before the press conference, went through, as I always do, the ground rules for making statements to the media, and that is that it is, in substance, limited to what the charges are and the allegations of the indictment; that we don't discuss evidence. We don't make comments with respect to the strength of the Government's case or anything else that would be inappropriate.

That was done. There was one conference in Los Angeles; it was at the FBI offices. I don't believe that there were any further comments by me or anybody else in the U.S. attorney's office on that case that followed from that.

I do know that the defense counsel, and not just Mr. Greenberg, but other defense attorneys, repeatedly held news conferences and made statements to the media virtually every week up until the very—the case was indicted in October. The first trial was set to go in March, and up to the very eve of jury selection, the defense counsel were making statements to the media that characterized witnesses and the strength of their case, et cetera.

And, ultimately, after admonitions by the Federal district judge in that case that the defense counsel should not be on the courthouse steps making comments, there was, at the request of the Government—at my request, the judge did enter a restraining order on counsel in that case, or what is sometimes known as a gag order.

But I think that the handling of the media, at least, certainly, in Los Angeles, was appropriate. It certainly wasn't used to—it wasn't intended by me to be used to influence a potential jury, nor do I believe that it had that effect.

But that generally is my policy with respect to any case, that it—by the way, the purpose of it, Senator, is essentially that there are certain kinds of cases, for example, the Camarena murder case that was indicted by my office, in which we can anticipate that we will be inundated by media calls.

On an average, we get about 40 a day, but where, because of the nature of the case, we are going to be inundated, as a matter of management control, quite frankly, in a limited number of cases it is preferable to have the agency SACs, with me, make an announcement that is limited to the substance of the allegations, and also to establish with the agencies what the lines are, what questions have to be no-commented on, what kinds of media inquiries are inappropriate to respond to.

So, in substance, that is, I think very briefly, how media is handled. I do have, I guess, what you would call a full-time media coordinator that I hired. That was for the purpose of having somebody who would respond to the numerous routine media inquiries that we do get, some of which can be appropriately responded to. I mean, when is so-and-so going to be arraigned; what is the bail in so-and-so's case, that kind of thing.

And, quite frankly, I think that that is something that in terms of the highest and best use of my time that I shouldn't be tied down with. And when I became U.S. attorney, essentially, the chief assistant, my then chief assistant, was trying to do that and he was spending most of his time responding to media inquiries. And, frankly, I think there is a better use for my chief assistant, who is my principal assistant.

So I have a media coordinator who does that, who also handles congressional inquiry letters, who also handles developing and researching certain things I need for speeches that I give from time to time.

The CHAIRMAN. You have been U.S. attorney how long?

Mr. BONNER. Just a little over 5 years.

The CHAIRMAN. Would you estimate that your predecessor had the same kind of active relationship with the press as you did?

Mr. BONNER. My immediate predecessor was Steve Trott. I don't know that he was as active as I have been. I don't really have any way of judging, though, in terms of frequency of press conferences, which I think, you know, are still relatively infrequent. I am not sure.

Mr. Trott was U.S. attorney for, I think, a little over 2 years before he was appointed as the Assistant Attorney General for the Criminal Division.

The CHAIRMAN. I understood one of the reasons you offered in the past for the need for the public relations person and the press conferences when they occurred was to dissuade similar behavior.

Mr. BONNER. Well, that is one of the purposes. I didn't mean to exhaust the purposes when I said as a management tool, where it is reasonable to expect we are going to be inundated with media inquiries.

Another purpose is, and I think it is a legitimate purpose, is to, on occasion where it is appropriate—many of the cases that we prosecute, certainly in the white collar area, but in some areas, are for the purpose of, among other things, establishing some general deterrence, and I think that there is a value on occasion in underscoring that message, and that is to say that certain kinds of conduct—kickbacks, for example, in the defense industry would be an example—that certain kind of conduct is being investigated and is being prosecuted; that there is some consequence of this activity.

Many of our prosecutions are for the purpose of establishing a general deterrent, and it is based upon the premise that if there is a prosecution, a conviction, and sometimes a meaningful or an adequate sentence, that you will deter other people who might be disposed to commit similar type of crimes.

Just one other example of this would be in the—I think I have had one press conference that concerned the schoolyard law. Congress, in the Anti-Drug Abuse Act of 1986, enacted some enhanced penalties for people that sell illegal drugs at or within 1,000 feet of schools.

That is an area in which I think it is important to some extent that you get out a message, first of all, that there is such a Federal law, because to the extent you have that law you may have—and, in fact, we have had the effect by virtue of some prosecutions in this area of deactivating drug sale hot spots in the city of Los Angeles near schools.

So there is some deterrent value in making known, if you will—again, I don't do it in every case, but certainly in the first case in an area, I did have some press conference that indicated what the schoolyard law was, that we were enforcing, that there are some very serious penalties that Congress has provided in terms of minimum sentence and maximum sentence.

The CHAIRMAN. I can understand the deterrence value, but what worries me, and I will get back to it, is the distinction between a press conference at the time of arrest or arraignment and a press conference at the time of conviction. I think there is a massive difference, but let me yield, because I know my colleague has to go, and I will come back to my questions.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Bonner, I consider judicial temperament to be a prerequisite for a Federal judge. Would you give me your thoughts on this subject?

Mr. BONNER. Well, I think a——

Senator THURMOND. You don't have to take too long now; boil it down.

Mr. BONNER. An appropriate judicial temperament, I think, really consists of courtesy, patience, treating parties and others that come before a court with dignity and respect, and I think that is what it boils down to and that is an appropriate standard to follow to have what I would call a good judicial temperament.

Senator THURMOND. I have seen some Federal judges yell at lawyers, jurors, and court attendants, and there is just no excuse in that.

Mr. BONNER. Sir, I have tried some cases——

Senator THURMOND. They have no business on the bench if they can't treat people courteously and nicely in the courtroom.

Mr. Bonner, Thomas Jefferson remarked shortly after the ratification of the Constitution that our Nation's particular security is the possession of a written Constitution. "Let us not make it a blank paper by construction," he said.

Now, what do you think he meant by that warning, "Let us not make it a blank paper by construction?"

Mr. BONNER. Well, you know, Senator, I spent about, I guess, between my first and second years of law school reading the letters and papers of Thomas Jefferson as part of a historical research project over at American University, and I was assigned to the period 1783 through about 1788, and that consisted of 10 volumes of letters and writings of Jefferson. I think I missed that particular one.

My sense of that, though, would be that, first of all, we ought not to construe or ignore the language of the Constitution in terms of being guided by it; that it is the great charter that was enacted to govern the Federal Government and its relationship with the States, and that to achieve the kind of democratic government that was envisioned by the Founding Fathers and by Jefferson, even though he was over in Paris, actually, during the Constitutional Convention, that we need to heed the words of that document and not ignore it for expediency or otherwise.

Senator THURMOND. Well, to put it simply doesn't the Constitution mean what it says and says what it means? My concern is why some judges put strained constructions on words that are plain.

Mr. BONNER. Exactly, Senator.

Senator THURMOND. That is the way I see it.

Mr. BONNER. I think that expressed it a little more succinctly than I did, but——

Senator THURMOND. You have a good record and I hope you will be confirmed and I wish you well.

Mr. BONNER. Thank you, Senator.

The CHAIRMAN. The former Chairman feels that way about the ninth amendment, too.

I would like to ask you about the *General Dynamics* case. In that case, your office and the Justice Department alleged that the company and several of its top officials, including a former NASA administrator, committed criminal fraud in connection with charges on a Defense Department procurement contract. That indictment was later dismissed on the Government's own motion.

Can you tell us what happened in that case?

Mr. BONNER. I can try. I don't know how many hours we have, Senator. No. I think I can——

The CHAIRMAN. What was it that caused the Government to indict these individuals, publicize the indictment, and then later dismiss the indictment?

Mr. **Bonner**. Well, let me say that there was an investigation that took place over about a 2-year period, perhaps even a little longer, of the FBI, the Naval Investigative Service, assisted by DCAA, in which the Department of Justice Fraud Section had responsibility and I had an assistant U.S. attorney assigned to that case.

After the investigation was completed or reached a certain point, the case was, I believe, very thoroughly and extensively reviewed by me and members of my management staff, as well as by the Department of Justice Fraud Section.

We concluded, obviously, based upon the evidence that was available at that time, that the case was prosecutable, and by that I mean that there was sufficient evidence not just of probable cause, but to obtain a conviction.

I might note parenthetically that a pre-indictment conference was afforded to counsel for General Dynamics and all of the targeted individuals, and indeed they made a presentation both to me and the chief of the Fraud Section of the Department of Justice prior to the case being submitted to a grand jury for consideration of an indictment.

And they were given an opportunity to point out errors and flaws that they saw and submit verbally and in writing, by the way—they also submitted papers——

The **Chairman**. Did they suggest that you speak with the Department of the Army employees before——

Mr. **Bonner**. Well, we spoke—first of all, we spoke to hundreds of witnesses, including many Department of Army employees, and subpoenaed hundreds of thousands, if not millions, of documents that were reviewed and evaluated by the agents and the Department of Justice attorneys on the case.

The **Chairman**. The explanation on the street is that, consistent with the Los Angeles Times and the National Law Journal explanation, you know, after the indictment you then went to speak with certain employees at the Department of the Army. They corroborated General Dynamics' position, and the case was dropped. Is that essentially what happened?

Mr. **Bonner**. In a sense. A year after the indictment was returned, new evidence did develop, and that consisted, if I remember, of two present or former Department of Army employees, and also the Department of Defense located about 82 boxes of documents, some of which bore on the negotiations of the General Dynamics prototype contract that we had requested and assumed didn't exist, but found did exist.

Not all 82 boxes of documents bore on the issue, but there were some documents in there that did bear on the issue that was presented in the case. It was essentially a case which involved the DIVAD antiaircraft gun system. General Dynamics had been awarded a prototype contract to build this system for $41 million, and it was a fixed price, $41 million.

At least according to the evidence, it appeared to us that clearly General Dynamics had shifted costs incurred on that contract to Government-funded overhead accounts, a so-called independent research and development account and the bid and proposal account.

But these are Government-funded overhead accounts, so the Government ended up paying the cost overruns.

Ordinarily and as a general rule—that is why I don't think that this is something that necessarily leaped out at us, nor was any evidence presented by General Dynamics before the indictment, although they had an opportunity to do so.

But, in essence, if you have a fixed-price contract and you shift costs knowingly and intentionally to Government-funded overhead costs, your overruns, ordinarily that is improper and illegal.

This contract was unusual in the sense that, among other things, it had a best-efforts clause in it, Senator, and the best-efforts clause essentially said, here are the contract requirements, here is the fixed price; you are obligated to utilize your best efforts to produce this prototype, an actual working antiaircraft gun system.

The defense at the pre-indictment conference did raise, as we did among ourselves, what was the meaning of this best-efforts clause. Did it have any effect in terms of making it permissible, if you will, for GD to shift these cost overruns to the Government-funded overhead accounts?

Frankly, you know, I have some experience in private practice in civil litigation and with private contracts. Frankly, absent somebody from the Department of the Army negotiating with GD or, during the course of the contract, saying, OK, you have got these cost overruns, it is OK if you shift them over to the overhead accounts—short of that, I would think it would be astonishing, almost Alice in Wonderland, if you will, that anybody would have drafted a contract, put in a fixed price of $41 million, and then say it was OK for costs incurred on that very contract to be shifted over to Government-funded overhead accounts.

The CHAIRMAN. Welcome to the Army.

Mr. BONNER. Yes. Well, we found out a year after the indictment that Alice in Wonderland existed; that, in fact, there had been at least—there was no bombshell in terms of the documents or the witnesses, but it did appear clear that it was a fair interpretation based upon the negotiations that, in fact, GD was expected to do no more than spend $41 million of the Government's money, produce absolutely nothing; use their best efforts, but if it ended up to be literally the bucket of bolts—here it is, this is all we have for you—that was their only obligation.

And when they concluded that obligation and continued on basically building the prototype system, they could treat it as if no contract had ever existed. Let me say——

The CHAIRMAN. What lessons do you think can be drawn from that?

Mr. BONNER. Well, the first you do is you put into that kind of contract some language that says this is a $41 million fixed-price contract and if your costs run over, you may not charge Government-funded overhead accounts. You will take the overruns out of your own corporate profits if you want to continue on and build the prototype.

The CHAIRMAN. Is there any lessons that can be drawn by your successor, not only from how to draw the contract from the standpoint of the Government, but also from the prosecutorial standpoint? Any lesson?

Mr. BONNER. Yes, I guess there are a couple of lessons, and that is, obviously, one should reach a decision that the evidence—you cannot obtain a conviction and the only appropriate thing to do is to dismiss the indictment. You wish you hadn't brought the indictment in the first instance and you wish you had had the information upon which to make that decision, and theoretically it was possible.

My sense of it is that there was—you know, there was an exhausting, protracted investigation that focused on a whole lot of issues now that are totally unimportant in hindsight and did not focus on is it possible, despite what DCAA is telling us as to the fact that this would be an improper shifting of charges, the general heading up the contract administration saying as an expert witness, by the way, potentially for us that this was an improper shifting of charges to the Government-funded overhead account, that this contract could be construed, assuming that there was discussion during the negotiations of what is meant by fixed price, what is meant by best efforts—that it could have been construed.

The problem was that it seemed so ridiculous to us at the time, and GD at the time before the indictment at the pre-indictment conference and otherwise, never presented us one shred of evidence.

You know, GD was present at these negotiations. They could have said, wait a minute; our people were there, they negotiated with the Army and this is what the Army told them, that once we reach $41 million, then we can treat it like there is no contract and we can charge to overhead accounts.

The CHAIRMAN. When it was dismissed, what did you say other than dismissing? Did you, in fact, say anything that would positively attempt to rehabilitate the reputation of either the company and/or the individual, Mr. Beggs?

Mr. BONNER. I don't—First of all, the dismissal was filed. General Dynamics, not surprisingly and quite appropriately, issued a press release announcing that the Government had dismissed the charges.

And by the way, I have said—I don't know whether I said it immediately—I treat that as a full exoneration of GD and those four individuals that were named in the indictment. I know that, again, it was a Department of Justice-U.S. attorney's office case, and the Department Fraud Section basically was heading up the case.

Mr. Weld, I know, who was the Assistant Attorney General for the Criminal Division at that time, did, in essence, eat crow, if you will, over the case. I don't remember——

The CHAIRMAN. Did anybody say I am sorry? You know, I mean one of my problems being here for 17 years is that Government is incredibly insensitive. The IRS never says I am sorry. Prosecutors hardly ever say I am sorry when they are wrong. Senators hardly ever say they are sorry when they are wrong.

When individuals' rights and reputations get banged around, somehow we treat it as if they had—you know, why did they make us do that to them? I just wondered, did you ever stand up and say at a press conference, which you were accustomed to having, that I am sorry. I feel badly for the families. I am sorry about what happened, et cetera? That is all. I am just trying to get a sense of judicial temperament here.

Mr. BONNER. Well, I don't recall doing that.

The CHAIRMAN. From the news release, I don't think there was anything like that said. That is my concern.

Mr. BONNER. Well, I think that, by the way, there was an apology given to Mr. Beggs. I know Attorney General Meese did write him a letter of apology on this case. It wasn't a matter that was discussed with me, by the way, but I know that was done.

And I think, in substance—I don't know that it was quite an apology, but I think, in substance, the Department of Justice did, through Mr. Weld, who was the one as the AG for the Criminal Division that was responding at that time—did, in substance, apologize. Now, maybe he didn't use the magic words, but——

The CHAIRMAN. Well, I won't prolong this, but the indictments involving General Dynamics' DIVAD anti-aircraft gun had been announced. It says—this is from the LEXIS—it says, "announced by Bonner at a televised news conference. But when the case was dropped, with Justice admitting its theory of prosecution was fatally flawed, the news was posted on a bulletin board in the Los Angeles court." Quite frankly——

Mr. BONNER. Well, I don't think that is quite accurate. The judge issued a dismissal order at the motion of the Government and I don't——

The CHAIRMAN. Yes, but I mean the only thing released by you in writing, as I understand it, was a posting on a bulletin board. I may be wrong. That is probably wrong.

Mr. BONNER. I think that refers to the clerk's office, but the—I don't want to quibble here. I mean, I think, in substance, you are right; I didn't issue a press release and I didn't have a press conference.

Frankly, the Department of Justice controlled the media response in the case, Senator.

The CHAIRMAN. OK.

Mr. BONNER. I mean, had this been purely my case, then I would have been, I think, expected to respond to it, rather than defer to Mr. Weld, who was the Assistant Attorney General for the Criminal Division.

The CHAIRMAN. It is not determinative, in my view, but, as you say, it is important. You said that one of the reasons why you would have press conferences was to get the message out. One of the reasons I ask these questions is to get the message out.

I think it is really important that when we make mistakes in Government that we do more than, not less than, but more than we did when we thought we were, in fact, protecting the public interest and public good, to make it known we made a mistake. I say that to judges. I say that to Senators. I say that to prosecutors, in particular.

And I would respectfully suggest that my recommendation is hardly ever followed. You are not alone. You are not alone. I can't think of the last time I saw a prosecutor who made a mistake. We all make mistakes. I am not criticizing that—and had to drop an indictment, who then held a press conference with the person they indicted and said I am personally sorry for what we caused. I think that is important to do. I think that is one of the things wrong with our Government.

Mr. Bonner, the committee has received letters from several individuals alleging that you failed to follow up on complaints they filed with your office about various matters. I might add that I am sure people would be ready to write letters that I failed to follow up on complaints that they have in my office.

But I have before me three such citizen complaint letters from the following individuals: Mr. Albert Barnes, Sr., Mr. Michael Garland, and Mr. Louis Furer. Staff has advised me that they discussed these letters with you and provided you with each of them.

Would you please, for the record, tell the committee how you handled these particular matters and the manner in which your office would customarily handle these matters?

Mr. Bonner. We receive 500 to 1,000 what I would call citizen letters that come in, and they can range from everything to give us some legal advice to we would like you to prosecute *x*, or that kind of thing.

By the way, not surprisingly either, there are maybe a quarter of these, maybe 30 percent, that are people that, just on the face of the letter, do not appear to be mentally stable. I remember I used to get, in my earlier days as a assistant U.S. attorney, letters from Peter Batman Baxter and General Hershey Bar. So, basically, those are not responded to because it tends to encourage further communication.

But the vast majority are legitimate inquiries and the process is to route them through the mail room in the U.S. attorney's office to an assistant U.S. attorney who is the chief of my Criminal Complaints Section, who looks at them. And they then go to a paralegal in the office, who, among many other duties, prepares or drafts an appropriate response to the letter.

So, that is generally how we process and handle these letters, and ultimately it would be an assistant U.S. attorney that responds to the particular inquiry that has been made.

I found files on two of the three individuals who have written the committee. Mr. Barnes, for example—we have about a half-inch file in which he has communicated with my office and we, through an assistant U.S. attorney in the manner I have described, have responded to him. We have eight separate letters that we have responded to him between 1985 and 1988.

Mr. Barnes basically was complaining about he believes that in conjunction with a fraud case that resulted in the loss of about $95 million to the Bank of America that we should be indicting certain people. It is a matter just generally, let me say, under investigation in the office. Certain related aspects of it have been subject to prosecution and about 18 convictions so far.

When I talked to your staff, I hadn't realized that we also—he was saying we didn't respond to phone calls. I was talking to my chief of my Major Fraud Section late last week and happened to mention Mr. Barnes, and the chief of my Fraud Section says that he has had several phone calls with him. He has spent several hours over the last—as recently as 1988 discussing his specific complaint; I mean, taking a lot of time and effort with him. But, nonetheless, Mr. Barnes, I don't think is going to be satisfied unless the people he wants to see indicted are indicted.

Mr. Furer—this is one we didn't have a record of, but he wrote—according to his own letter to the committee, wrote to my office back in the 1984-1985 timeframe. We keep these citizen letter files for about 3 years. It is really until we run out of storage room in the basement, but it is about 3 years. So we don't happen to have a file.

I have no doubt that he wrote the office. He says I personally responded. That is even possible, although ordinarily I would have an assistant U.S. Attorney who would be reviewing these things and responding.

He, in substance, thought that certain Paine Webber employees should be—he had a suit against Paine Webber. He thought we should prosecute certain employees of Paine Webber for, according to him, allegations that they committed perjury during the civil proceedings, depositions or otherwise.

We indicated in a response to him that we didn't think that was warranted. As a practical matter, simply because of office resources, we rarely prosecute perjury in civil cases. Almost every losing party thinks that somebody on the other side committed perjury, so——

The CHAIRMAN. Well, in the interest of time, what I would suggest you do is just submit in writing the explanation of the last one, okay?

Mr. BONNER. I would be happy to, sir.

The CHAIRMAN. The last question I have is, as an experienced litigator, I am sure you have had a number of occasions to observe Federal judges and the various ways in which they manage cases.

Have you given any thought to how you intend to manage your cases, should you be confirmed? For example, have you thought about how you would go about controlling discovery or limiting the inordinate delays that might characterize some litigation?

Mr. BONNER. Let me say I don't know that I have thought about it in great detail. I am still actively engaged as U.S. attorney, but I have had passing thoughts on this, I suppose, since my days as a law clerk to a Federal judge.

I think a Federal judge has to exercise some responsibility in terms of management and control of the civil cases. I think in Los Angeles the average civil docket or number of civil cases is around 300 or so. So I think it is important, for one thing, to have the early status conferences on cases that are now mandated by the Federal rules, to use those adequately and effectively in terms of trying to flush our as much as you can about what the nature of the action is about, and being able to set reasonable but relatively short discovery deadlines.

I realize there are certain cases that are sufficiently complex and time-consuming and that there really are, if not dozens, hundreds of witnesses that have to be deposed. But I think as a district judge that in talking to counsel you can get a handle on that, set a reasonable time limit for discovery cutoff, anticipating from what counsel tells you as to the number of depositions and type of discovery that is going to need to be taken.

So I think a Federal judge has a responsibility in this area to see that discovery isn't abused and to see that civil cases are moved along.

The **Chairman**. I hope you do. As your colleague on your right can tell you, there is power that you have. I am one who thinks that one of the burgeoning problems in our whole system of justice is that there is an inordinately high cost to any average citizen in pursuing civil litigation that in large part turns into inordinately long, ponderous, and unnecessary discovery. We are literally pricing middle-class people in this country out of the system of justice that exists in this country. So I hope you will exercise your authority with diligence and with a firm hand.

I have no more questions. I yield to my colleague.

Senator **Thurmond**. I have no more. Thank you very much.

The **Chairman**. Thank you very much.

Mr. **Bonner**. Thank you.

[Pertinent information follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 11, 1989

Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is the response of Robert C. Bonner to your written questions with regard to his nomination to be a United States District Judge for the Central District of California.

If we can be of further assistance, let us know.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Acting Assistant Attorney General

cc: Senator Strom Thurmond
Ranking Minority Member
Committee on the Judiciary

RESPONSES OF ROBERT C. BONNER
TO THE WRITTEN QUESTIONS OF
SENATOR JOSEPH R. BIDEN, JR.
CHAIRMAN OF THE SENATE JUDICIARY COMMITTEE

RESPONSES OF ROBERT C. BONNER TO WRITTEN QUESTIONS OF SENATOR JOSEPH R. BIDEN, JR.

PRE-TRIAL PUBLICITY

QUESTION: You have reportedly stated that one of the purposes in publicizing cases indicted by your office was to deter crime and dissuade "individuals who might be inclined to commit certain kinds of federal crime from doing so, because there is a consequence to it."

How do you balance the value of deterrance against the interests and needs of defendants in criminal cases to be free of prejudicial and harmful pretrial publicity generated by the prosecutors office?

In other words, how do you ensure that your office's publicity does not infringe on the defendant's rights to a fair and impartial jury and trial?

RESPONSE: I ENSURE THAT STATEMENTS BY ME AND MEMBERS OF MY OFFICE DO NOT GENERATE PREJUDICIAL PRE-TRIAL PUBLICITY WHICH WOULD INFRINGE ON AN ACCUSED'S RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY IN THE FOLLOWING MANNER:

1. BY LIMITING ANY STATEMENT BY ME OR MY OFFICE TO THE MEDIA TO A SINGLE ANNOUNCEMENT OF THE CHARGES AT THE TIME AN INDICTMENT OR OTHER FORMAL CHARGE IS BROUGHT.
2. BY LIMITING STATEMENTS TO THE MEDIA AT THE TIME OF INDICTMENT TO THE ALLEGATIONS OF THE INDICTMENT AND THE CHARGES, BY NOT EXPRESSING A BELIEF IN AN ACCUSED'S GUILT, BY NOT COMMENTING ON OR CHARACTERIZING THE STRENGTH OF THE GOVERNMENT'S EVIDENCE, BY NOT DISCUSSING EVIDENCE THAT WILL BE INTRODUCED AT TRIAL, BY NOT DISCLOSING ANY CONFESSION OR ADMISSIONS MADE BY THE ACCUSED, AND BY NOT DISCLOSING HIS PRIOR CRIMINAL RECORD OR HIS ASSOCIATION WITH NOTORIOUS GROUPS.
3. BY MAKING NO FURTHER STATEMENTS TO THE MEDIA COMMENTING ON A CASE AFTER INDICTMENT, UNTIL THE TRIAL IS COMPLETED.

RESPONSES OF ROBERT C. BONNER TO WRITTEN QUESTIONS OF JOSEPH R. BIDEN, JR.

QUESTION: As a judge, you may very well be called upon to decide issues of pretrial publicity. Is there case law in the Ninth Circuit on the issue of pretrial publicity? And, if there is, what is your understanding of the law?

RESPONSE: I HAVE NOT EXHAUSTIVELY RESEARCHED THE LAW IN THE NINTH CIRCUIT ON THIS ISSUE, BUT IN GENERAL THE CASE LAW OF THE NINTH CIRCUIT RECOGNIZES THAT NOT ALL PRE-TRIAL PUBLICITY CAUSES PREJUDICE TO AN ACCUSED'S RIGHT TO A FAIR TRIAL. RATHER, PREJUDICIAL PRE-TRIAL PUBLICITY IS COMMONLY "THE TYPE THAT PROCLAIMS THE DEFENDANT'S GUILT IN ADVANCE OF TRIAL AND PREJUDICES THE MINDS OF THE PUBLIC AGAINST THE DEFENDANT TO SUCH AN EXTENT THAT MOST PEOPLE ARE UNABLE TO WEIGH THE EVIDENCE [INTRODUCED AT TRIAL] OBJECTIVELY." SEE UNITED STATES V. BAILLEAUX, 685 F.2d 1105 (9th Cir. 1982). THE MERE FACT THAT A POTENTIAL JUROR HAS HEARD OR READ ABOUT A CRIME DOES NOT MEAN THAT HE OR SHE CANNOT RENDER A FAIR AND IMPARTIAL VERDICT. Ibid. at 1109.

DIRECT RESTRAINTS ON THE MEDIA IN ORDER TO CURB PRE-TRIAL PUBLICITY ARE ALMOST NEVER APPROPRIATE OR JUSTIFIABLE, IN LIGHT OF THE FIRST AMENDMENT'S GUARANTEE OF A FREE PRESS. SEE, CBS, INC v. U.S. DISTRICT COURT, 729 F.2d 1174 (9th Cir. 1984). ON THE OTHER HAND, THE NINTH CIRCUIT HAS RECOGNIZED THAT A DISTRICT COURT MAY IMPOSE LIMITED AND TAILORED RESTRAINTS ON COUNSEL FOR THE PARTIES WHEN THERE IS A CLEAR SHOWING THAT COUNSEL HAVE MADE AND WILL CONTINUE TO MAKE INAPPROPRIATE STATEMENTS TO THE MEDIA OF THE TYPE THAT CAN REASONABLY BE EXPECTED TO CREATE A SERIOUS AND IMMINENT THREAT TO THE SELECTION OF AN IMPARTIAL JURY. SEE, LEVINE V. UNITED STATES DISTRICT COURT, 764 F.2d 590 (9th Cir. 1985).

REPSONSES OF ROBERT C. BONNER TO WRITTEN QUESTIONS OF SENATOR JOSEPH R. BIDEN, JR.

THE MILLER CASE

QUESTION: In deciding to become personally involved in the prosecution of the Miller case you won the admiration of many in your staff for "getting down in the trenches" and "banging heads with defense lawyers." As I stated during the hearing, however, one of Mr. Miller's attorneys has stated that you used news conferences as "the first step in jury selection."

What specifically did you or your office do in publicizing the Miller case?

RESPONSE: PRIOR TO MILLER'S CONVICTION IN JUNE 1986, I HELD ONE PRESS CONFERENCE WHICH OCCURRED ON OCTOBER 12, 1984, THE DAY THE GRAND JURY RETURNED THE INITIAL INDICTMENT AGAINST RICHARD MILLER AND SVETLANA AND NIKOLAY OGORODNIKOV. THE PRESS CONFERENCE WAS HELD AT THE U.S. ATTORNEY'S OFFICE IN LOS ANGELES, AND CONCURRENTLY THEREWITH I ISSUED A PRESS RELEASE, A COPY OF WHICH IS ATTACHED HERETO. AT THE PRESS CONFERENCE, I STATED THE SUBSTANCE OF THE CHARGES AND ALLEGATIONS OF THE INDICTMENT. I DID NOT EXPRESS ANY OPINION OR BELIEF AS TO MILLER OR THE OTHER DEFENDANTS' GUILT, I DID NOT DISCUSS OR CHARACTERIZE THE STRENGTH OF THE GOVERNMENT'S EVIDENCE, NOR DID I DESCRIBE ANY OF THE EVIDENCE THE GOVERNMENT INTENDED TO INTRODUCE AT TRIAL. I DID NOT MAKE ANY STATEMENT TO THE MEDIA LIKELY TO CREATE PREJUDICIAL PRE-TRIAL PUBLICITY.

PRIOR TO THE INDICTMENT, I ATTENDED A PRESS CONFERENCE CALLED BY THE SPECIAL AGENT IN CHARGE OF THE FBI'S LOS ANGELES OFFICE. THAT PRESS CONFERENCE OCCURRED ON OCTOBER 3, 1984, THE DAY AFTER THE ARREST OF MILLER AND THE OGORODNIKOVS, PURSUANT TO A CRIMINAL COMPLAINT AND ARREST WARRANT AUTHORIZED BY A U.S. MAGISTRATE. THE FBI SPECIAL AGENT IN CHARGE ANNOUNCED THAT MILLER HAD BEEN TERMINATED BY THE FBI AND THAT HE HAD BEEN ARRESTED IN SAN DIEGO ON CHARGES OF CONSPIRACY TO COMMIT ESPIONAGE ON THE NIGHT OF OCTOBER 2, 1984. I DO NOT RECALL MAKING ANY STATEMENT AT THE FBI PRESS CONFERENCE.

RESPONSES OF ROBERT C. BONNER TO WRITTEN QUESTIONS OF

SENATOR JOSEPH R. BIDEN, JR.

ON THE MOTION OF MILLER, HIS TRIAL WAS SEVERED FROM THAT OF THE OGORODNIKOVS. FURTHER, AT THE SPECIFIC REQUEST OF MILLER'S ATTORNEYS, HIS TRIAL WAS SCHEDULED TO FOLLOW THE TRIAL OF THE OGORODNIKOVS. THE TRIAL OF THE OGORODNIKOVS STARTED IN APRIL 1985 AND CONCLUDED IN LATE JUNE 1985 WHEN BOTH OGORODNIKOVS PLEADED GUILTY TO CONSPIRACY TO COMMIT ESPIONAGE.

MILLER'S TRIAL DID NOT BEGIN UNTIL AUGUST 1985, -- TEN MONTHS AFTER HIS INDICTMENT. BECAUSE THE JURY IN THE FIRST MILLER TRIAL HUNG 11-1 AND 10-2 FOR CONVICTION ON ALL COUNTS OF THE INDICTMENT, IT WAS NECESSARY TO RETRY HIM. THE SECOND TRIAL OF MILLER BEGAN IN FEBRUARY 1986 AND CONCLUDED IN JUNE 1986 WITH GUILTY VERDICTS ON SIX OF SEVEN COUNTS AGAINST MILLER.

OTHER THAN THE ONE PRESS CONFERENCE HELD BY ME AT THE TIME OF THE INDICTMENT, I HELD NO PRESS CONFERENCES, ISSUED NO PRESS RELEASES AND MADE NO COMMENTS TO THE MEDIA CONCERNING THE MILLER CASE BETWEEN THE TIME OF MILLER'S INDICTMENT IN OCTOBER 1984 AND HIS CONVICTION IN JUNE 1986.

QUESTION: And was the publicity generated in the Miller case greater than in other cases?

RESPONSE: VIRTUALLY ALL OF THE PRE-TRIAL PUBLICITY IN THE MILLER CASE WAS GENERATED BY (1) DOCUMENTS FILED IN COURT AND MATTERS OF PUBLIC RECORD, INCLUDING THE CRIMINAL COMPLAINT AND SUPPORTING AFFIDAVIT, THE INDICTMENT, THE NUMEROUS MOTIONS AND BRIEFS FILED IN CONNECTION WITH NUMEROUS PRE-TRIAL MOTIONS OF THE DEFENSE ATTORNEYS FOR MILLER AND THE OGORODNIKOVS, (2) EXTENSIVE PRE-TRIAL HEARINGS IN THE CASE, INCLUDING, E.G., BAIL HEARINGS, EVIDENTIARY HEARINGS IN CONJUNCTION WITH MILLER'S MOTION TO SUPPRESS HIS ADMISSIONS, MOTIONS TO SUPPRESS EVIDENCE SEIZED PURSUANT TO SEARCH WARRANTS, ETC., (3) COMMENTS TO THE MEDIA BY THE ATTORNEYS FOR MILLER AND THE OGORODNIKOVS, AND (4) THE THREE-MONTH TRIAL OF THE OGORODNIKOVS AT WHICH MILLER HIMSELF TESTIFIED.

RESPONSES OF ROBERT C. BONNER TO WRITTEN QUESTIONS OF

JOSEPH R. BIDEN, JR.

THE PRE-TRIAL PUBLICITY IN THE MILLER CASE WAS EXTENSIVE, BUT IT HAS BEEN EQUALLED OR EXCEEDED BY SEVERAL OTHER FEDERAL CRIMINAL CASES PROSECUTED IN THE CENTRAL DISTRICT OF CALIFORNIA.

ATTACHMENT

ROBERT C. BONNER
United States Attorney
1200 U. S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

Telephone: (213) 688-2400

October 12, 1984

PRESS RELEASE

EX-FBI AGENT AND SOVIET COUPLE INDICTED ON ESPIONAGE CHARGES

United States Attorney Robert C. Bonner announced today that a federal grand jury in Los Angeles returned a thirteen count indictment naming former FBI Agent RICHARD W. MILLER, age 47, as well as SVETLANA OGORODNIKOVA, age 34, and her husband NIKOLAY OGORODNIKOV, aka Nikolay Wolfson, age 51, as defendants. Prior to his termination as an FBI agent, MILLER was assigned to a Foreign Counterintelligence squad of the FBI's Los Angeles Office. MILLER maintained residences in Lynwood and Bonsall, California. The OGORODNIKOVs are Soviet emigres who have resided in the United States as permanent resident aliens since 1973.

The first count of the indictment charges MILLER and the OGORODNIKOVs with a conspiracy to violate U.S. espionage laws by communicating and delivering classified documents relating to the national defense of the United States to agents of the Union of Soviet Socialist Republics. The grand jury indictment also names ALEXANDR GRISHIN, the Vice Consul of the Soviet Consulate in San Francisco, as an unindicted co-conspirator with MILLER and the OGORODNIKOVs. Bonner said that, by virtue of GRISHIN's diplomatic status, he is immune from prosecution under the doctrine of diplomatic immunity.

The conspiracy is alleged to have begun in August 1984 and continued to October 2, 1984, when it ended with the arrests by the FBI of MILLER and the OGORODNIKOVs. The indictment further alleges that the objects of the conspiracy were to be accomplished by, among other things, MILLER's providing classified documents and information to SVETLANA OGORODNIKOVA who would, in turn, provide these materials to other agents of the Soviet Union. To carry out the conspiracy, the indictment charges that the defendants and unindicted co-conspirator GRISHIN committed various overt acts.

In addition to the conspiracy charge, the indictment charges various other violations of the federal laws relating to espionage, unlawful delivery and receipt of classified documents, and bribery. Counts 2, 3 and 4 charge MILLER with taking and copying a classified document entitled "Reporting Guidance: Foreign Intelligence Information" in August 1984 and then delivering that document to agents of the Soviet Union. The OGORODNIKOVs are charged with having aided, abetted, and induced these violations of law on the part of MILLER. In Count 6, MILLER is also charged with unlawful delivery of another classified document, which is not further identified, on or about September 12, 1984. SVETLANA OGORODNIKOVA is charged with unlawfully receiving these classified documents from MILLER. (Counts 5 and 7.)

In addition to the foregoing charges, SVETLANA OGORODNIKOVA is charged with offering MILLER bribes on two separate occasions in September 1984, the bribe offers being in the form of $50,000 in gold and $15,000 in cash, in order to induce MILLER to remove and disclose official FBI documents to unauthorized persons and to meet with agents of the U.S.S.R. at a place outside the United States. (Counts 8 and 10.) A separate charge alleges that on or about September 26, 1984, SVETLANA OGORODNIKOVA gave MILLER a bribe in the form of arranging for the purchase of a $675 trench coat. (Count 12.) MILLER, in turn, is separately charged with having agreed to accept the $50,000 and $15,000 bribes and with having accepted the item of clothing as a bribe. (Counts 9, 11 and 13.)

Bonner said that today's indictment was the result of an intensive six-week investigation by the FBI.

The maximum sentence for conspiracy to commit espionage (count 1) is life imprisonment. Life imprisonment is also the maximum sentence for delivering a document relating to the national defense. (Count 3.) The maximum penalty for each violation charged in counts 2, 4, 5, 6 and 7 is ten years imprisonment and a $10,000 fine. The maximum sentence on each of the bribery counts (counts 8-13) is fifteen years' and a fine of $20,000.

Bonner stated that he will personally participate in the prosecution of this case and that he will be assisted in the prosecution of this case by Assistant United States Attorney Bruce Merritt.

It is anticipated that that defendants, all of whom are in custody and being held without bail, will be arraigned in federal court in Los Angeles on Monday, October 22, 1984.

. . .30. . .

SUMMARY OF INDICTMENT

COUNT	DEFENDANTS	CHARGE	MAXIMUM SENTENCE
1	Miller, S. Ogorodnikova N. Ogorodnikov	Conspiracy to commit espionage, etc.	Life imprisonment
2	Miller - as principal Ogorodnikovs - as aiders and abettors	Unlawfully obtaining information respecting the national defense	10 years; $10,000
3	Miller - as principal Ogorodnikovs as aiders and abettors	Unlawfully delivering documents relating to the national defense	Life imprisonment
4	Miller - as principal Ogorodnikovs as aiders and abettors	Unlawfully communicating classified information	10 years; $10,000
5	S. Ogorodnikova as principal Miller and N. Ogorodnikov as aiders and abettors	Unlawfully receiving classified information	"
6	Miller - as principal Ogorodnikovs as aiders and abettors	Unlawfully communicating classified information	"
7	S. Ogorodnikova - as principal Miller and N. Ogorodnikov as aiders and abettors	Unlawfully receiving classified information	"
8	S. and N. Ogorodnikovs	Offering a bribe - $50,000 in gold	15 years $20,000
9	Miller	Agreeing to receive a bribe - $50,000	15 years $20,000
10	S. Ogorodnikova as principal N. Ogorodnikov as aider and abettor	Offering a $15,000 bribe	"
11	Miller	Agreeing to receive a $15,000 bribe	"
12	S. Ogorodnikova	Giving a bribe - $675 coat	"
13	Miller	Accepting a bribe - $675 coat	"

U. S. Department of Justice

United States Attorney
Central District of California

United States Courthouse
312 North Spring Street
Los Angeles, California 90012

April 13, 1989

The Honorable Joseph R. Biden, Jr.
United States Senate
489 Russell Senate Building
Washington, D.C. 20510-0802

Dear Senator Biden:

In lieu of my reappearance before the Judiciary Committee for further testimony in connection with my nomination to the federal district court for the Central District of California, I am pleased to advise the Committee that, with regard to all communications by me with members of President Bush's staff and members of the Justice Department who serve Attorney General Thornburgh:

1) I did not make any commitments with regard to how I might rule on any specific case or issue nor were any such commitments sought.

2) My personal views on controversial cases or issues were not solicited in a manner to suggest that I should commit myself to rule in a particular way on issues or cases to advance my nomination.

3) I was not subjected to an "ideological litmus test."

4) I have no doubt that everyone who spoke to me expected me, if nominated and confirmed, to exercise my best independent judgement on every matter brought before me.

Sincerely,

Robert C. Bonner

ROBERT C. BONNER
United States Attorney

The CHAIRMAN. Our next witness will be Judge Harmon. Welcome, Judge, and I want to compliment your children. This is above and beyond the call.

TESTIMONY OF HON. MELINDA F. HARMON, HOUSTON, TX, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS

Judge HARMON. Thank you, Senator.

The CHAIRMAN. I mean, this bores me and you, and I can't imagine what it is doing to them. I don't mean your presence bores me. I mean it is a very tedious hearing for anyone to sit through, particularly a 4 or 5 or 3 or 7-year-old, whatever the various ages are.

Judge HARMON. I understand.

The CHAIRMAN. Judge Harmon, do you have anything you would like to say at the outset, not that you need to?

Judge HARMON. No. Just let her rip.

The CHAIRMAN. Well, welcome again.

Judge HARMON. Thank you.

The CHAIRMAN. Judge, in your response to the committee's questionnaire, you described your practice at Exxon as including personal injury, worker's compensation, oil and gas contracts, Petroleum Marketing Practicing Act, real estate, environmental, and general contract litigation.

How much of your practice was in State court and how much in Federal court?

Judge HARMON. About—On the average, about 50 percent in each, with earlier years being skewed to the State side and later years being skewed to the Federal side.

The CHAIRMAN. When did you last try a case to verdict in a Federal court?

Judge HARMON. 1980—a jury trial or——

The CHAIRMAN. Well, it doesn't matter. Just when did you try a case to verdict in a Federal court, jury or non-jury.

Judge HARMON. 1984.

The CHAIRMAN. Can you tell us a little bit about that case as well?

Judge HARMON. That case was an EEOC case for Exxon Shipping Co. in which I defended Exxon Shipping Co.

Senator THURMOND. You might speak a little bit louder, please.

Judge HARMON. I am sorry.

The CHAIRMAN. You have to just pull that——

Senator THURMOND. Pull your machine up to your mouth.

Judge HARMON. All right. Is that better?

The CHAIRMAN. Yes. Tell us a little bit about the case.

Judge HARMON. It was an EEOC case in which a female employee had sued Exxon Shipping Co. alleging that she had not—that she had been discriminated against because she had not been promoted to a job, and I can't remember the name of it. It is a term of art in the—it is a dispatching job, but I can't think of the term of art in the shipping industry.

The CHAIRMAN. In your response to the questionnaire, there was no mention of any experience in the area of criminal law. As you know, of course, many of the cases heard by Federal district court judges are criminal cases, and particularly where you are going to be residing.

Judge **Harmon**. Yes.

The **Chairman**. Do you believe that your lack of criminal law experience will be any sort of impediment to your assuming the duties of a district court judge in the Houston area?

Judge **Harmon**. No, Senator, I don't because I don't really believe that the criminal law is so complicated that one cannot learn it if one is sufficiently motivated and is willing to spend the time and energy and effort. In fact, yesterday I went over to the Federal Judiciary Center and talked to Mr. Dan Scoler, who is the head of their training section, and talked to him about the training and, in fact, ordered about seven videotapes, presumptuously perhaps, but in hopes that I will be confirmed by the Senate, so that I could get up to speed as soon as possible.

Also, the other judges there very much—they tell me they are very much in need of my services and they have offered—all of them have offered to help me get to the point, and I am really feeling fairly confident now, especially with these new sentencing guidelines, that I should be able to learn the job fairly quickly.

The **Chairman**. I sincerely hope you will look closely at the sentencing guidelines, since several of us wrote them. I hope you will take them into more than consideration.

Judge **Harmon**. Well, it takes a great load off my mind knowing that they are there. I will say that.

The **Chairman**. What about the area of constitutional law? There is no mention of experience in that area in your response to the committee's questionnaire. As you indicated, since becoming a judge, you have not rendered any significant opinions on Federal or State constitutional law issues.

Do you think that lack of experience will present a problem in assuming duties as a Federal district court judge?

Judge **Harmon**. Well, I do not. When I was a law clerk, of course, we dealt with constitutional law and I enjoyed that very much. I enjoyed studying it in law school and, you know, I think it is a very interesting area of the law. And, again, I think, you know, it just takes time, effort, and motivation to learn that kind of law, and I certainly would intend to do that.

The **Chairman**. What have you thought about, other than on-the-job training, to render yourself more prepared to deal with cases involving criminal and constitutional issues?

Judge **Harmon**. I am not sure I understand.

The **Chairman**. Have you thought about how you will prepare yourself? You indicated you went over to the training center and you got some videotapes. I mean, is there any regimen that you would feel is necessary for you or advantageous for you to put yourself through prior to or while assuming the bench, to get yourself better prepared to handle those issues?

Judge **Harmon**. Well, as I understand, when one is nominated, one is sent over a large box of items that give you—you know, there are bench books and things of that kind. Certainly, reading those, consulting with the other judges, consulting with the chief judge, and basically reading all the background cases—you know, we have been receiving slip opinions from the fifth circuit since last year, I have, and, you know, reviewing those and reading those.

But I think on-the-job training and certainly looking at cases as they come in and reading all the cases—I mean, that should be the best way I would think to get prepared.

The **Chairman**. Well, I would like to send you a couple of my speeches on enumerated rights. Maybe we can——

Judge **Harmon**. I would love to read some of your speeches.

The **Chairman**. Well, there is only one. In case you are nominated for the Supreme Court, I want you to be ready. And the reason, by the way, I have not questioned you or the previous two nominees on those issues is that I am assuming that you are obviously not only bright, honorable people, but that you believe stare decisis is, in fact, a guiding principle; and that you are not on the district court and circuit court level to make law. You only get to do that when you get to the Supreme Court level. So maybe I should save my speech on unenumerated rights until you are nominated for the Supreme Court.

Canon II of the American Bar Association's Code of Professional Responsibility calls for every lawyer, regardless of professional workload, to find some time to participate in serving the disadvantaged. And I am quoting, "Every lawyer, regardless of professional workload, should find some time to participate in serving the disadvantaged," end of quote.

In your response to the committee's questionnaire, you list three pro bono clients over the course of your 14 years as an attorney. Can you explain what you did in each of these matters?

Judge **Harmon**. Well, I believe I listed the Missionary Brothers of Charity, which was a charitable organization that is part of Mother Teresa's group, and they were—one thing I did is they were donated some property and they needed some title work done, what we call stand-up title work, going down to the courthouse and examining the files, making sure that the people who gave them the property actually did own the property, that kind of thing. I did that for them, and also got their—they are a California charitable corporation. I got their Texas charter.

I represented an elderly lady who needed a will. She had only one piece of property; she wanted to be sure it went to her children and I wrote her will for her. And then later when she died, I represented her family in probating the will.

And then I handled a divorce for a lady who did not have very much money and she had a child.

The **Chairman**. Are there any other pro bono activities in which you have been involved?

Judge **Harmon**. I have handled another divorce of the same type, and have generally counseled people not on any kind of formal basis, but simply counseled people on various problems that they have had over the years, just giving them legal counsel.

The **Chairman**. In response to the financial data and conflict of interest section of the committee's questionnaire, you filed your complete copy of your financial disclosure report. In that report, you indicated numerous investments and trusts.

I realize that this question was asked of you in the questionnaire, but I will ask you to state it here under oath and for the record.

How will you resolve any potential conflict of interest? Please include in your answer the procedure you will follow in determining these areas of concern.

Judge HARMON. Well, I would certainly continue to recuse myself in any case involving my husband's law firm, which I have done on the State court bench. And, certainly, while I continue to hold Exxon stock which I got as a result of my employment, I would certainly, you know, recuse myself in those cases, as I have done in the State court.

As far as the trust is concerned, it is a trust that was set up for the benefit of my children, and in that particular area I am simply going to have to seek guidance. If I am fortunate enough to become a Federal judge, I am going to have to seek some guidance from the chief judge and other wiser heads about exactly how to handle recusal with regard to that trust.

The CHAIRMAN. Now, my last question—I will submit two questions to you in writing—but my last oral question is: Is the real reason you are taking this job or are prepared to take this new job because of the oilspill?

Judge HARMON. No, Senator.

The CHAIRMAN. All right. Thank you very much.

Senator.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Harmon, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own. How would you respond to this defense of an activist judiciary?

Judge HARMON. Well, Senator, I believe that it is a judge's duty and obligation to look at cases on a case-by-case basis and decide cases. In other words, the judge is not a problem solver. Rather, the judge is there to facilitate the just resolution of disputes between parties, and I don't believe it is the place of the judiciary to interfere. If the legislature doesn't act, then that is the people speaking. It is not for the judiciary to go into that area.

The CHAIRMAN. I construe what you say, then, that you think the legislative body, which at the Federal level is the Congress, would make the law?

Judge HARMON. That is correct, sir.

Senator THURMOND. And you would leave that to them?

Judge HARMON. That is what I would do, yes, sir.

Senator THURMOND. And you will interpret the law?

Judge HARMON. To the best of my ability, yes, sir.

The CHAIRMAN. You have got the right answers.

Judge Harmon, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of the court clearly conflicts with the Constitution as that judge interprets it? Would you follow stare decisis or would you go out on your own because you don't agree with that decision?

Judge HARMON. I would definitely follow stare decisis.

Senator THURMOND. And then a high court, an appellate court, correct that if it is wrong?

Judge HARMON. That is correct.

Senator THURMOND. That is the right answer. I have nothing further.

Judge HARMON. Thank you, Senator.

Senator THURMOND. I will be glad to support your confirmation and wish you well.

Judge HARMON. Thank you. I appreciate that very much.

Senator THURMOND. Mr. Chairman, I am through.

The CHAIRMAN. Well, Judge, Senator Kennedy has submitted some questions for you, and there are others who may have questions. Again, as I said to the other nominees, the quicker you can answer the questions, the quicker we can move.

Again, I compliment your lovely family on their patience. They should be so proud of the fact that their mom is going to be a Federal judge. That is a big deal. That is a big deal, even if it is because you want to avoid talking about the spill.

But I want to thank you very, very much for being here and you are dismissed.

Judge HARMON. Thank you very much, sir.

The CHAIRMAN. This is probably the last time most of you will have to sit down there with someone looking down at you.

It was probably an unusual experience for you, judge, wasn't it, to be on the other end of this podium?

Judge RYMER. It was a lot of fun.

The CHAIRMAN. Yes. I am not looking forward to it.

Judge HARMON. May I take my lovely family out?

The CHAIRMAN. You may take your family out, and if they have time or interest, you are welcome to come by and see some of the offices here. You are welcome to just go get something to eat on me if you want. You are probably hungry and thirsty, but whatever you would like to do.

Judge HARMON. Thank you, sir, very much.

The CHAIRMAN. Thank you.

Senator THURMOND. I want to commend you especially, too, because the chairman, as I construe it, has committed to support you.

Judge HARMON. I think I heard that, too, Senator.

The CHAIRMAN. I think you heard it correctly, based upon your answer to the potential conflict of interest question I am going to submit to you.

Judge HARMON. Thank you.

The CHAIRMAN. Thank you.

[Pertinent information follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

April 11, 1989

Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is the response of Judge Melinda F. Harmon to your written questions with regard to her nomination to be a United States District Court Judge for the Southern District of Texas.

If we can be of further assistance, let us know.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Acting Assistant Attorney General

cc: Senator Strom Thurmond
Ranking Minority Member
Committee on the Judiciary

MELINDA F. HARMON'S RESPONSES TO CHAIRMAN BIDEN'S QUESTIONS

QUESTION

In your response to the financial data and conflict of interest section of the committee's questionnaire, you filed your completed copy of the Financial Disclosure Report. In the report, you indicated what appear to be numerous investments and trusts. I realize that this question was asked of you in the questionnaire, but I will ask you to state under oath and for the record, how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

ANSWER

Should I become a Federal Judge, when a case is filed in my court it will be immediately screened for potential conflict of interest problems as a matter of routine. Should a conflict be apparent at that time I will recuse myself on my own motion from the case. At any time thereafter should there come to my attention what is regarded to be a conflict I will recuse myself on my own motion, at that time. In any instance where doubts existed I would of course seek appropriate guidance from the Chief Judge of the Southern District of Texas and the Code of Judicial Conduct.

QUESTION

Please identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your service as a U.S. District Court Judge.

ANSWER

a. cases in which my husband, members or associates of his law firm were representing either side.

b. cases in which my husband's father, brothers, or sister represented either side.

c. cases on which I had worked while in the litigation section at EXXON.

d. cases in which there existed a possible conflict arising out of my having been judge on a lawsuit in the State courts.

e. cases in which either my husband, our children or I had a financial interest, including cases involving corporations in which stock is held.

f. cases in which my husband's law firm is a party.

BIDEN'S QUESTIONS

QUESTION

Please state for the record your recusal policy with respect to matters involving Exxon in light of your work with and investments in the company.

ANSWER

It has been my policy as a state court judge, and I would expect that it would continue to be my policy should I become a Federal Judge, to recuse myself from any case involving as litigants Exxon or its affiliates as long as I owned stock in that company or there were cases pending upon which I had worked while I was employed with Exxon. Of course I would seek appropriate guidance on any question involving a potential conflict of interest issue with regard to an Exxon matter.

QUESTION

Please indicate for the record what you believe your recusal policy would be with respect to those financial interests held not only by you, but also by or for the benefit of members of your immediate family.

ANSWER

My policy would be to recuse myself in cases involving as litigants entities in which my husband or I have financial interests, including, corporations in which my husband or I own stock either outright or in trust.

My children are beneficiaries of 3/11th's of a trust set up by my husband 's grandfather's will in 1961. The trust will not vest for approximately 25 years. The children receive no income or any benefit from the trust in the interim. By contract the funds of that trust are controlled completely by a professional money manager who, it is my understanding, buys and sells stocks. By contract the trustees have no input into the decision to buy or sell any stock. I have placed no funds in the trust, nor do I have any control over the trust. Although my husband is one of the three trustees, the sole function of the trustees is to choose the professional money manager who maintains the funds. I had no knowledge of the identities of any assets held by the trust until my accountant obtained a copy of a report of the trust's assets in order to file the Financial Disclosure Statement pursuant to the Ethics in Government Act. I will certainly make every effort to strictly comply with the standards of the Code of Judicial Conduct. Accordingly, in the light of the existence of this trust, should I become a Federal Judge, I would seek the advice of James De Anda, Chief Judge of the Southern District of Texas and of the advisory committees of the

BIDEN'S QUESTIONS

Judicial Conference of the United States as to what steps I should take in order to comply with the Code. I would do whatever was deemed necessary to satisfy those standards, including recusing myself when appropriate.

THE STATE OF TEXAS

MELINDA HARMON
JUDGE, 280TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002
(713) 221-5518

April 13, 1989

Honorable Joseph R. Biden, Jr.
United States Senate
489 Russell Senate Building
Washington, D.C. 20510-0802

Dear Senator Biden:

In lieu of my reappearance before the Judiciary Committee for further testimony in connection with my nomination, I am pleased to address the Committee that, with regard to any communication which I had with members of the Justice Department who serve Attorney General Thornburgh (I had no communication with members of President Bush's staff):

1) I did not make any commitments with regard to how I might rule on any specific case or issue nor were any such commitments sought.

2) My personal views on controversial cases or issues were not solicited in a manner to suggest that I should commit myself to rule in a particular way on issues or cases to advance my nomination.

3) I do not believe that I have been subjected to an "ideological litmus test."

4) I have no doubt that everyone who interviewed me expected me, if nominated and confirmed, to exercise my best independent judgment on every matter brought before me.

Sincerely,

Melinda Harmon

MH:jjk

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Mr. **Chairman**. Last but not least is Mr. Barr. Mr. Barr, would you please come forward?

Senator **Thurmond**. Mr. Barr, I have another appointment. I have to go to the White House in just a little bit. I have studied your record. You seem to be well prepared to fill this position. It is a very important position. You are practically adviser to the President and his lawyer, as well as the Attorney General. You have a big responsibility and I wish you well. I will be glad to support your nomination.

TESTIMONY OF WILLIAM P. BARR, FALLS CHURCH, VA, TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. **Barr**. Thank you, Senator.

Senator **Thurmond**. Thank you, Mr. Chairman.

The **Chairman**. There was one reference, Mr. Barr, to Alice in Wonderland earlier by a prosecutor, and every time I hear it I think of my chairman, who is always my chairman—he is no longer chairman, but he still runs things—Senator Thurmond.

I think in "Alice in Wonderland," wasn't there a line saying "hang first and trial later," or whatever? Well, if you notice, there is some, paraphrasing—I am very careful about quoting these days—our former chairman, if you notice, announces his verdict before the hearing begins. And you should be very pleased to know, all of you, that before the hearing was held he was going to support you all.

But, Mr. Barr, we are going to proceed to your nomination now. You are going to be the Assistant Attorney General, if confirmed, in charge of the Department's Office of legal Counsel.

Mr. Barr, you are the first Justice Department nominee to appear before the committee in the One Hundred First Congress, and on behalf of the committee I want to welcome you. Mr. Barr, the position for which you have been nominated is, in my view, an extremely important one. Indeed, it is among the most important positions in the Department of Justice.

As described in a 1988 article in the New York Times, the Office of Legal Counsel, quote, "serves as the executive branch's brain trust on the most fundamental issues of Presidential power," end of quote.

One need only look at the published opinions of the Office of Legal Counsel to appreciate the breadth and complexity of the issues the office addresses. In turning the pages of some of these recent volumes, one comes across such issues as the constitutionality of recess appointments, the use of polygraph examinations, the President's authority to control the export of hazardous materials, and the constitutionality of the legislative veto.

There is no doubt that the person who heads the Office of Legal Counsel must deeply appreciate the importance of scholarship and must have a healthy enthusiasm and admiration for the Constitution.

Beyond those attributes, perhaps the most important responsibility of the Office of Legal Counsel is to provide legal advice to the

Attorney General. The person who heads the office, in effect, becomes the Attorney General's lawyer.

But like every public official, the person in charge of the Office of Legal Counsel also owes allegiance to the constitutional law of the land. In that regard, one of the issues that I intend to discuss with you today is your independence, how independent you will be.

More specifically, I would like to determine the action you should take should that inevitable situation arise where your legal advice is directly at odds with the policy that the Attorney General and the President would like to pursue.

I also want to discuss your views on the doctrine of separation of powers. The head of the Office of Legal Counsel is responsible for making recommendations to the President and the Attorney General about the resolution of legal and constitutional issues concerning the executive branch. He must be sensitive to the legitimate role of Congress and the judiciary as coequal branches of Government.

There are a number of other matters I intend to pursue with you as well. If I am unable to reach those matters today, I will submit them in writing to you, as I will to some of the judicial nominees.

Mr. Barr, your predecessors, former Judge Malcolm Wilkey, for whom you clerked, to Nicholas Katzenbach, to Antonin Scalia, to name just a few, faithfully interpreted the statutes and their legislative history, and carefully considered constitutional history and doctrine in fulfilling their responsibility as counsel to the Attorney General and ultimately to the President of the United States. Should you be approved by this committee and confirmed by the Senate, it will be my hope and expectation that you will do the same.

Now, Mr. Barr, one of the most important responsibilities is to tell high-ranking administration officials that there is no legal basis for a course of action that they may have proposed. That can be a lonesome and often difficult task, especially for a young man, and I mean that sincerely. The pressure of and the weight of the offices you are advising are significant.

I have been here for five Presidents and when I see a President in the backyard of the White House, when I see a President up here or I see a President on the stump, it is one thing. But when I get summoned into the Oval Office, no matter how many times it occurs, there is something about the majesty of this Government that has an impact. And you will be under the same pull and tug, potentially, of the majesty of the office of Attorney General, as well as the President. And as I said, it can be a lonesome task.

I would like to hear your views on the issue of your independence, which I believe is one of the most important issues that confronts the Office of Legal Counsel. What course of action would you take when faced with what you believe to be a conflict between your legal analysis and a proposed policy?

Mr. **Barr**. Senator, I had never met Attorney General Thornburgh before I went to talk to him about a position in the Department of Justice, and we specifically discussed this issue and he told what he expected of me.

He told me he wanted someone in the Office of Legal Counsel who would give him intellectually honest, objective advice as to what the law is, without any tilt or spin or wiggle, but to shoot straight and let the chips fall where they may.

You know the Attorney General, Senator, and you know that is the way he operates, and it is on that basis that I accepted the position.

The CHAIRMAN. What will you do if confronted by this Attorney General or any other Attorney General with a situation where your clear legal judgment is to say no and the policy judgment is to say yes? What do you believe your responsibility is under those circumstances? Is it merely to render the opinion?

Mr. BARR. Do you mean the Attorney General's policy judgment?

The CHAIRMAN. The policy of the administration as executed either by the Attorney General or by the President.

Mr. BARR. Well, Senator, if I gave my legal opinion, my best legal judgment to the Attorney General on an issue and he disagreed with that legal judgment, I would be disappointed. I would try to persuade him that I was correct, but if he reached a different legal conclusion on an issue where there were two possible outcomes—and as you know, most of the questions that come to OLC are difficult issues—he is, after all, the chief lawyer in the administration. He is the President's lawyer; he is the lawyer for the Cabinet.

And as long as I felt it was a reasonable and plausible position he was taking in good faith, I would accept that. Now, if——

The CHAIRMAN. How about if you didn't believe that?

Mr. BARR. Excuse me?

The CHAIRMAN. How about if you reached a different conclusion; that it was not plausible?

Mr. BARR. If I believed that any official in the Government was violating the law, I would bring that to the attention of my superiors and——

The CHAIRMAN. You see, the problem is your superiors are the Attorney General and the President. This is not an idle question.

Mr. BARR. Well, Senator——

The CHAIRMAN. And your confirmation depends in large part upon how you answer the question. I mean it sincerely. In my experience here in 17 years, we have had more than one occasion when an Attorney General has pursued a policy which was clearly beyond the law.

Mr. BARR. OK. In the situation where the Attorney General was pursuing an illegal act, I would resign my position.

The CHAIRMAN. I hope you mean that.

Mr. BARR. Senator, Judge Wilkey was kind enough to share a copy of the letter that he sent to this committee, and he has known me for a long time and I think he says in that letter that he feels that I would not tolerate any illegal action and I would give up a position in Government if that were the case.

The CHAIRMAN. You are correct. We will submit for the record the Wilkey letter.

[Information follows:]

UNCLASSIFIED

Department of State

INCOMING

TELEGRAM

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FM AMEMBASSY MONTEVIDEO
TO SECSTATE WASHDC IMMEDIATE 0770
USDOJ WASHDC IMMEDIATE

UNCLAS MONTEVIDEO 01921

STATE PLEASE PASS TO SENATORS BIDEN AND THURMOND

DOJ FOR WILLIAM P. BARR, ROOM 5224

E.O. 12356: N/A
TAGS: AMGT
SUBJECT: OFFICIAL-INFORMAL

1. FOLLOWING IS TEXT OF A LETTER FROM AMBASSADOR WILKEY TO SENATORS BIDEN AND THURMOND AND FOR WILLIAM P. BARR AT DOJ.

-

2. BEGIN TEXT:

THE HONORABLE JOSEPH BIDEN
CHAIRMAN
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ASHINGTON, D. C. 20510

- IN RE: WILLIAM P. BARR
- NOMINEE FOR ASSISTANT ATTORNEY GENERAL
- OFFICE OF LEGAL COUNSEL

-

DEAR SENATOR BIDEN:

-

MY LONG-TIME FRIEND AND FORMER LAW CLERK BILL BARR HAS BEEN NOMINATED BY PRESIDENT BUSH TO BE HEAD OF THE OFFICE OF LEGAL COUNSEL IN THE DEPARTMENT OF JUSTICE. THIS IS AN OUTSTANDING APPOINTMENT IN EVERY WAY. I SAY THIS FROM TWO POINTS OF VIEW: MY OWN EXPERIENCE AS HEAD OF THE OFFICE OF LEGAL COUNSEL IN THE LAST YEARS OF THE EISENHOWER ADMINISTRATION AND MY PERSONAL ACQUAINTANCE WITH THE QUALIFICATIONS OF BILL BARR. INCIDENTALLY, IF CONFIRMED, HE WILL TAKE OVER THE OFFICE OF LEGAL COUNSEL AT THE SAME AGE AT WHICH I DID, 39.

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I KNOW WHAT IS REQUIRED OF THIS OFFICE. BILL BARR HAS A REMARKABLE BLEND OF INTELLECTUAL BRILLIANCE AND GOOD COMMON SENSE. BOTH ARE NEEDED TO PROVIDE WISE COUNSEL TO THE ATTORNEY-GENERAL, TO THE OTHER EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDIRECTLY TO THE PRESIDENT. SOMETIMES WE HAVE HAD IN THIS OFFICE A BRILLIANT INTELLECT WHO LACKED COMMON SENSE, OR, SOMEONE WITH COMMON SENSE, BUT LACKING THE INTELLECTUAL BRILLIANCE TO GAIN THE RESPECT OF THE VERY TOP-NOTCH LAWYERS WHO MAKE UP THE OFFICE OF LEGAL COUNSEL. IN NEITHER CASE HAS THE RESULT BEEN GOOD. BILL BARR WILL BRING BOTH NECESSARY ATTRIBUTES TO THIS VERY RESPONSIBLE POSITION.

-

HE HAS MANY OTHER QUALITIES WHICH ARE NECESSARY. THE FIRST IS ABSOLUTE INTELLECTUAL HONESTY AND INTEGRITY. BILL BARR HAS THE GUTS TO SAY NO WHEN SAYING NO IS THE BEST ADVICE HE CAN GIVE. I THINK HE WOULD HAVE THE COURAGE TO DO WHAT IS NOW ALMOST UNTHINKABLE IN WASHINGTON: RESIGN ON A QUESTION OF PRINCIPLE, IF IT WERE THAT IMPORTANT AND

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APPROPRIATE. HE HAS A CAPACITY FOR BRILLIANT INTELLECTUAL ANALYSIS, A VERY CLEAR AND CONCISE WRITING STYLE, AN EASY WAY OF DEALING WITH PEOPLE AND GETTING THE MOST OUT OF THEM, AND A SENSE OF UNDIVIDED LOYALTY.

-

IN MANY WAYS, THE OFFICE OF LEGAL COUNSEL IS THE FOCAL POINT OF LEGAL ANALYSIS IN THE WHOLE EXECUTIVE BRANCH, AND OF THE EXECUTIVE BRANCH'S RELATIONSHIP ON LEGAL MATTERS WITH THE OTHER TWO BRANCHES. HE SERVED IN THE WHITE HOUSE UNDER PRESIDENT REAGAN FOR A YEAR AND A HALF: HE SERVED ON THE PRESIDENTIAL TRANSITION TEAMS OF 1980 AND 1988; HE CLERKED FOR ME ON THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT, FOR A YEAR. WHILE ATTENDING GEORGE WASHINGTON UNIVERSITY LAW SCHOOL HE WORKED FOR FOUR YEARS IN A FULL-TIME JOB AT THE CENTRAL INTELLIGENCE AGENCY IN THE LEGISLATIVE LIAISON SECTION, THUS GIVING HIM CONTACT AND UNDERSTANDING OF THE CONGRESSIONAL BRANCH. HE HAS HAD SEVEN YEARS OF SERVICE IN THE FEDERAL GOVERNMENT, CONTACT WITH ALL THREE BRANCHES, AND NINE YEARS OF PRIVATE LAW PRACTICE, THUS ALL IN ALL PROVIDING AN EXTRAORDINARILY WELL-ROUNDED EXPERIENCE FOR ONE HIS AGE.

-

YOU MAY EVALUATE MY ABOVE OPINIONS BY MY CONTACTS WITH BILL BARR. I HIRED HIM AS A LAW CLERK FOR THE 1976-77 TERM OF COURT, WHEN I FOUND HE HAD FINISHED SECOND IN HIS GEORGE WASHINGTON UNIVERSITY LAW CLASS, COMPETING WITH BOTH DAY AND NIGHT STUDENTS, WHILE HOLDING DOWN HIS FULL-TIME LEGISLATIVE LIAISON JOB WITH THE CENTRAL INTELLIGENCE AGENCY. HE IS ONE OF THE ALL-TIME OUTSTANDING CLERKS AMONG MY 37, WHO ARE ABSOLUTELY TOP-NOTCH LEGAL BRAINS. WE KEPT IN CLOSE AND FRIENDLY CONTACT OVER THE YEARS, AND WHEN I LEFT WASHINGTON I ENTRUSTED THE SALE OF MY CONDOMINIUM TO BILL. I HAVE FOLLOWED HIS CAREER IN THE GOVERNMENT AS WELL AS IN PRIVATE PRACTICE WITH GREAT INTEREST, AND KNOW THAT HIS COLLEAGUES IN EVERY POST HAVE HAD THE VERY HIGHEST OPINION OF HIM AND HIS WORK.

-

BILL BARR WILL BE AN OUTSTANDING HEAD OF THE OFFICE OF LEGAL COUNSEL, IF THE SENATE SEES FIT TO CONFIRM HIM. I RESPECTFULLY URGE YOU TO DO SO.

-

SINCERELY,

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-

MALCOLM R. WILKEY

-
-

CC: THE HONORABLE STROM THURMOND
- RANKING MINORITY MEMBER
- COMMITTEE ON THE JUDICIARY
-
- WILLIAM P. BARR
- DEPARTMENT OF JUSTICE, ROOM 5224
-

END TEXT. WILKEY

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The CHAIRMAN. Mr. Barr, in several important ways, the Office of Legal Counsel is similar to the Office of Solicitor General. Both offices have longstanding traditions of independence and extraordinary legal competence. The occupants for both offices for the most part have done their best to resist partisan political posturing and to avoid in any way politicizing the office. The occupants of both offices have considered their client to be not just the President of the United States, not just the Attorney General, but the Constitution itself.

Since the time that you were first considered for this office, I am sure you have had a chance to reflect upon this tradition. What are your views on the role of the Office of Legal Counsel and on your personal commitment to this tradition? More specifically, do you see your office as legal in nature, policy oriented in nature, or something else altogether?

Mr. BARR. Senator, I view the office as purely legal in nature, and I think the role of the office can be stated very simply, and that is exactly what the Attorney General asked me to do in that job, and that is to provide careful legal judgments based on objective conclusions about where the law is, where the law stands today, based on careful research and judicious weighing of all the competing arguments, and then coming to the best possible judgment as to what the law is.

And in that respect, it may differ from the role of the Solicitor General's office in the sense that I don't believe it is the role of the Office of Legal Counsel to try to push the law one way or the other, or to play an activist role in the evolution of the law. I think the office's role is to inform the Attorney General as to where the law stands.

Now, I think the tradition of the office—its great value in the Government has been precisely its capacity to do that and to build up the reputation that it is the one place you could go perhaps in the executive branch for that objective opinion that is not driven by any particular policy concerns.

And I am very concerned about maintaining that tradition, strengthening it, and carrying it forward, and if I can strengthen that tradition and at the end of my time there people have that perception of the office, then I will be satisfied with the job I did.

The CHAIRMAN. Well, I agree with your answer, and I would respectfully suggest to you that you must strengthen that position. And if you do, you will not only serve your Nation well; you will serve yourself well. You will serve yourself well not only in that office, but well beyond that office long after you have vacated that office; because, if you notice, the people we all remember in this town and this country are the people who have been the people of principle. And the job which you have been nominated for is one that should be done as you have suggested.

As you well know, the only matters that must go through your office, the Office of Legal Counsel, pertain to Executive orders. Beyond that, the Office of Legal Counsel renders an opinion only when it is asked to do so.

Now, do you have any indication, and if you do, would you share it with us, to what extent the Attorney General or the President plan on using the office beyond what they must use it for, which is to render opinions on Executive orders?

Mr. BARR. Senator, I haven't been in an acting capacity and I haven't been in the office. I am still at Shaw Pittman, although I have tried to spend time over at the Department of Justice.

But I have talked a great deal to the Attorney General and I have talked to the counsel to the President, and I have every indication that the Office of Legal Counsel will continue to play the role it historically has of responding to executive departments and the White House and the Attorney General himself for legal advice on a broad range of issues.

A great deal of the work of the office doesn't get much play in the press. Probably 75 percent of the work of the office is responding to requests from different agencies and departments about an interpretation of some arcane law, and that takes a lot of work, but it is very important work and I think that will continue.

The CHAIRMAN. Why do you think you were nominated? I am not being facetious when I ask that question. Was it because of your—why do you think you were nominated? Obviously, there are a lot of women and men, like yourself, who possess the qualities and capabilities for this job. I mean, why do you think you got to that point?

Mr. BARR. Well, I think it is a combination of factors, Senator. First, I knew a lot of the people who are involved in the Bush administration. I started in Government at the Central Intelligence Agency in 1973 and stayed there through 1977, I believe, and I first had exposure to President Bush when he was the Director of Central Intelligence, saw him in action then and had great admiration for him and have been a supporter of his since that time, and was honored by serving in the White House for a short period of time during the first term of the Reagan administration.

And during that time, I met many of the individuals who are holding positions now at the White House and as Cabinet secretaries in other departments. Partly through those associations, I ended up at the transition and was giving legal advice to people about different matters relating to the transition.

And, of course, during the Reagan administration, even when I was on the outside in private practice, people would talk to me and ask for my judgment on various matters.

The CHAIRMAN. That seems sufficiently clear. I appreciate your answer.

Let me suggest to you that I only have a few more questions, but as you probably know, much of what you will be asked to render a judgment on relates to constitutional issues. Based on your answers to the committee questionnaire, it seems that many of the matters on which you have worked did not involve constitutional issues.

Could you fill in some of the details about, and elaborate on, your constitutional law experience?

Mr. BARR. My constitutional experience is—direct experience in practice is relatively limited, Senator. I have been in private practice for 9 years at a large Washington law firm. During that time, I have handled a few matters involving constitutional law. Those principally related to first amendment issues.

Unfortunately, I didn't have clients who would ask for my legal advice on some of the important separation of powers questions that you mentioned earlier, although I wish I had had those clients.

But at the Central Intelligence Agency, we did, obviously, encounter a lot of constitutional issues, separation of power issues in those days. You will recall that those were difficult times where the investigations of the Central Intelligence Agency were going on and people were talking about how to control the intelligence function of our Government, and that raised a number of issues. And then I clerked for Judge Wilkey on the District of Columbia Circuit, where we did handle constitutional issues.

I have always been interested in the law generally. I have read widely in the constitutional law area, and I also read widely in the area of American history and history is a very important part of our constitutional law. That is basically my background in the area, Senator.

One of my predecessors told me that—one of my distinguished predecessors told me he had never heard of the appointments clause before taking over the Office of Legal Counsel, but he soon became an expert in it. And a lot of the issues that the office deals with are not the kind of issues that you would really encounter outside the office.

The **Chairman**. You will also hear of the faithful execution clause a lot, too; and I will submit a couple of questions in writing to you on that issue.

Mr. **Barr**. Yes, sir.

The **Chairman**. Mr. Barr, in the famous case *Youngstown Sheet and Tube Company* v. *Sawyer*, the Supreme Court held that President Truman acted outside his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills.

In his concurrence, Justice Robert Jackson wrote:

> While the Constitution diffuses power, the better to secure liberty, it also contemplates that practice will integrate and disperse powers into a workable government. It enjoins upon its branches separateness, but interdependence; autonomy, but reciprocity.

I believe that the separateness and interdependence and this autonomy and reciprocity truly are the touchstones of our Nation's greatness. History has demonstrated time and again the genius of the system of checks and balances that the framers created.

Should you be confirmed, you will be confronted with many questions relating to that doctrine of separation of powers. In that regard, I would like you to respond to the quote I just read from Justice Jackson's concurrence and provide the committee with your views on the notion of the separation of powers doctrine.

Mr. **Barr**. Well, I agree with Justice Jackson's remarks in his concurring opinion in that case. It is a very broad issue, what are my views on separation of powers.

The **Chairman**. Start anywhere you would like.

Mr. **Barr**. Well, let us start with Aristotle. The idea of separation of powers does go back to—well, our Constitution is a unique document in several respects, but one of which is that it is the product of both experience and theory.

The theory of separated government goes way back to the Greeks and the Romans, and the idea that the most stable form of government and the government that is least disposed toward degenerating into some form of tyranny is a government that separates the powers.

And I think through the course of their struggle for independence, those notions took on added meaning for the framers, and through the experience of the Revolution and the federation, coupled with that theory, they formed a government with generally three divided powers.

And the purpose of it, as Justice Jackson says, is to protect the liberties of the people, not necessarily to provide the most efficient form of government, but a government that will ultimately protect the liberties of the people.

Now, in certain areas, they permitted those powers to overlap by granting and conferring on the various branches, particularly the political branches, powers that—well, actually, the powers that would theoretically be awarded to the other branch.

For example, the President is given a role in legislation through the veto power. The Senate is given a role in the appointments process through this proceeding we are going through here, the advice and consent power.

The CHAIRMAN. Some think, by the way, that the President was given a role in that process by the Constitution, but that is another issue.

Mr. BARR. OK, Senator. But by these grants of power, they gave each of the branches significant checks on the activities of the other branches. And sometimes that, as I say, doesn't lead to efficient government, but over the long run the freest government.

The CHAIRMAN. I have four more questions and what I am going to do, in the interest of time and the interest of your ability to more fairly respond to them—they all relate to things that are going to have a significant impact upon your office—is submit them in writing.

I would like to know your view and notion of stare decisis and how bound we are by it; and under those circumstances when the Solicitor General makes the occasional call to you, what you are going to be guided by. I also have a question about gray mail, as you will remember from your days at the CIA, and also questions about the faithful execution clause, which you will, I suspect, be asked to speak to more.

I will submit all of those in writing. The quicker you can get back to me in answering those questions, the quicker we can move on the vote on your confirmation.

If I was complimenting the others, I think the medal of honor goes to mom and your three beautiful girls, having absolutely amazing—it is worse than being in church, isn't it? They are looking at me like, my goodness. But you girls have been really, really lovely, and your mommy and daddy are not only brave, but they obviously knew what good girls you were before they brought you.

I compliment you both on your children——

Mr. BARR. Thank you, Senator.

The CHAIRMAN [continuing]. And also on your willingness to take this job. I know moving from the private sector to taking this job is going to be a little sacrifice for mom and the kids. The only thing I can tell you is thank God they are not college age. So I thank you again.

[Pertinent information follows:]

SHAW, PITTMAN, POTTS & TROWBRIDGE
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
2300 N STREET, N. W.
WASHINGTON, D. C. 20037

TELEX/CABLE
89-2693 (SHAWLAW WSH)

TELEPHONE
(202) 663-8422

VIRGINIA OFFICE
1501 FARM CREDIT DRIVE
MCLEAN, VIRGINIA 22102
(703) 790-7900

TELECOPIER
(202) 223-3760 & 223-3761

ZAP MAIL
(202) 775-0338

WILLIAM P. BARR

April 10, 1989

Honorable Joseph R. Biden
Chairman
Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed my responses to the written questions which you, Senator Thurmond, and Senator Grassley referred to me at the close of my hearing on April 5.

I appreciate the opportunity to make this submission.

Sincerely,

William P. Barr
William P. Barr

cc: Honorable Strom Thurmond
Ranking Minority Member
Senate Committee on the Judiciary

RESPONSES OF WILLIAM P. BARR TO QUESTIONS FROM SENATOR BIDEN

Question: Article II of the Constitution specifies in Section 3 that the President "shall take care that the laws be faithfully executed." This is a rather unique clause in the Constitution, as no other speaks in terms of taking "care" and acting "faithfully." It is also an exceedingly important clause, since it is a broad source of the President's power in domestic affairs. And it is a clause that the Office of Legal Counsel must often address.

Can you give me your thoughts on the Faithful Execution Clause?

In the context of the Faithful Execution Clause, let me ask you about the relationship between the Executive Branch and the Supreme Court on constitutional issues. In a now well-known speech in October 1986, former Attorney General Meese drew a distinction between "the Constitution and constitutional law." Mr. Meese asserted that

> "if a constitutional decision is not the same as the Constitution itself, if it is not binding in the same way that the Constitution is, we as citizens may respond to a decision with which we disagree."

Do you believe, as this passage from Mr. Meese's speech suggests, that the Executive Branch is free to disregard a decision by the Supreme Court that it concludes cannot be squared with the Constitution -- that the Executive Branch is free, in other words, to choose not to execute the laws because its interpretation of the Constitution differs from the Supreme Court's?

Answer:

Part 1: As part of the principle of separation of powers, the Framers believed that the power to execute the laws and the power to make the laws should be kept in separate hands. The Faithful Execution Clause reflects this belief. I read the Clause, together with the first sentence of Article II, as conferring on the President not only the power -- but indeed the affirmative responsibility -- to execute the laws. The President is not free to enforce only those laws he deems wise, while ignoring those with which he disagrees. Moreover, the Clause charges the President with responsibility for superintending the faithful execution of the law by others.

Part 2: I believe that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Consequently, I do not believe that the Executive Branch is free to disregard a decision by the Supreme Court. I view the Supreme Court rulings as binding on the Executive and Congress.

Question: One of the most fundamental doctrines in Anglo-American jurisprudence is the doctrine of stare decisis -- "to stand by things decided." It is a principle that counsels respect for precedent. And it is a principle that must be both firm and flexible -- firm enough so that there is stability in the law, yet flexible enough so that erroneous decisions can be corrected.

There undoubtedly have been, and will continue to be, occasions when the solicitor general consults with the office of legal counsel on constitutional issues raised in cases before the supreme court.

What are the standards and principles to which you would look in determining when it is appropriate for the Justice Department to urge the Supreme Court to overturn one of its prior decisions?

Answer: I believe stare decisis is a policy of fundamental importance to our judicial system. I would not lightly recommend departure from the policy. Stare decisis promotes stability, ensuring that, from case-to-case, the law will have a predictability on which people can rely. It promotes the deliberate evolution of legal doctrine, and the impartial, even-handed administration of justice. It also fosters respect for the integrity of the courts. As Justice Frankfurter explained, however, "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." Helvering v. Hallock, 309 U.S. 106, 119 (1940).

If, in a particular case, the Solicitor General asked my advice on whether it was appropriate to urge the Supreme Court to overturn one of its prior decisions, I would consider a number of factors. These include: whether the prior ruling seems clearly inconsistent with basic constitutional principles; whether society's settled expectations and reliance interests would be substantially disrupted by overruling the prior precedent; whether the prior ruling has proved unworkable, bred confusion, distorted other well-settled areas of the law, or led to unforeseen and anomalous results; whether overruling the prior case would undermine public confidence in the integrity of the judicial system; and whether there are other means of ameliorating the prior precedent.

Question: During the past several years, much attention has been paid to the Independent Counsel law. There have been attacks on its constitutionality, led in large part by former members of the Reagan Justice Department. Fortunately, in my view, those attacks failed, and in an opinion last year, the Supreme Court firmly upheld the constitutionality of the law.

More recently, the Independent Counsel has been in the news in the context of the Oliver North case. The question there is no so much one of constitutionality but of the operation of the Independent Counsel law in cases involving the classified information procedures act -- the so-called "Graymail" statute, which I authored in 1980. It's quite possible that at some point in the not-too-distant future, we in the Congress will have to take a look at the relationship between those two laws in that narrow set of cases in which an Independent Counsel has been appointed.

If we undertake such a review, I for one will surely want to hear the views of the Justice Department. And I suspect that the Office of Legal Counsel will offer its opinion to the Attorney General as the department prepares its views.

My question is two-fold. First, what is your opinion on the constitutionality of the Independent Counsel statute? I recognize that the Supreme Court's opinion is the law of the land, but I am still interested in your views. Second, to the extent that you've thought about the issue, what are your views on the relationship between the Independent Counsel law and the Graymail law?

Answer: First, prior to Morrison v. Olson, 108 S.Ct. 2597 (1988), I entertained doubts about the constitutionality of the Independent Counsel statute. I had thought that the statute might violate the doctrine of separation of powers by impinging upon the President's control over prosecutorial functions. I also had thought that the statute might violate the requirements of the Appointments Clause. These issues were addressed in Morrison, and, of course, I fully accept the Supreme Court's ruling. Constitutional issues will undoubtedly continue to arise in other applications of the statute in particular cases. Should such issues arise, I would attempt to resolve them in a manner consistent with the Morrison decision.

Second, I am generally aware of the Graymail statute, and my impression is that, overall, it has been successful and worthwhile legislation. To be frank, however, I have not given thought to the relationship between the Graymail statute and the Independent Counsel law. From newspaper accounts I am aware that issues have arisen in the North case. However, I have no familiarity with how that trial is being handled or how well the two statutes have meshed in that case. My impression, however, is that, by and large, disputes concerning classified information have been handled satisfactorily to date.

If I am confirmed and ultimately asked to provide OLC's views on this matter, I would certainly want to study more closely the practical experiences to date before venturing an opinion.

RESPONSES OF WILLIAM P. BARR
TO QUESTIONS FROM SENATOR THURMOND

Question: The Assistant Attorney General in charge of the Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and the executive branch agencies. Would you tell the Committee how your background and experience have prepared you for this extremely important position?

Answer:

I believe that my experience in both the public and private sectors have helped to prepare me for this position. My government service has given me exposure to both national security and domestic legal matters, as well as exposure to the operation and interrelationship of all three branches of government. At the CIA, I worked in legislative affairs and saw the importance of cooperation between the two political branches. At the U.S. Court of Appeals, a court that handles the kind of complex administrative and constitutional matters that make up so much of the work in the Office of Legal Counsel, I learned how our judicial system works. At the White House, I was exposed to the broad range of legal issues that arises in the executive branch's operations and its relationship with Congress.

I have also practiced for nine years with a large Washington, D.C. law firm. My practice has dealt with federal regulatory and administrative matters over a wide range of issues. I believe that, through these experiences, I have developed the judgment that is essential in this position.

Question: One of the major responsibilities of the Office of Legal Counsel is to provide legal advice for the Attorney General. In effect you will serve as the Attorney General's lawyer and the General Counsel for the Department of Justice. If an occasion should arise when your best legal advice conflicted with a policy which you knew the Attorney General wished to pursue, what actions would you take in an attempt to resolve this conflict?

Answer:

As I discussed with Chairman Biden during my testimony, the Attorney General has made it clear that he expects me to provide him, the White House, and others to whom the Office renders advice, the most objective, well-reasoned legal opinions possible, irrespective of policy objectives. I accepted the appointment as Assistant Attorney General on this understanding of my role, and I fully expect to fulfill my duties in this manner.

As to particular matters, as you know, the Attorney General is the chief law enforcement officer for the United States, not the Assistant Attorney General. As a consequence, should the situation arise that the Attorney General after discussion and careful consideration of relevant authorities reaches a legal conclusion different from that reached by my Office, I will respect that good faith determination. Given the difficulty of the issues that are brought to OLC for ultimate resolution, good faith differences of opinion are to be expected and, indeed, are not uncommon.

On the other hand, should I ever conclude that officials, including my superiors, are knowingly and willfully violating the law, I would do all within my power to prevent the wrongdoing. If other means failed, I would resign my position rather than be a party to ongoing violations of law.

RESPONSES OF WILLIAM P. BARR
TO QUESTIONS FROM SENATOR GRASSLEY

Question: 1. Please give me your general views on the constitutionality of arbitration of issues in controversy arising from administrative programs. Specifically address the following:

(a) To what extent does Article I forbid Congress from delegating functions to private deciders?

(b) Is arbitration by private parties in government programs consistent with Article II's grant of executive power to the President?

2. If you believe that Appointments Clause or delegation doctrine concerns prevent conferral of decisional authority on private arbitrators, please explain how this view can be reconciled with the many federal programs in which private decisionmakers now play a role (e.g., procedures under disputed Medicare claims, appeals from Department of Education grant disallowances, employee grievance procedures under the Civil Service Reform Act of 1978).

Answer:

Based upon my experience in private practice, I am quite sympathetic toward ADR. I myself have participated in arbitration and have found this to be more efficient, expeditious, and generally more satisfactory to my clients than full-blown litigation. In some of the complex cases I have handled as a private practitioner, I have proposed the use of ADR techniques. As a general matter, I favor ADR wherever appropriate.

I have neither examined in detail nor formed an opinion on the extent to which ADR techniques can be constitutionally employed in the context of government regulatory and administrative decisionmaking. As you know, OLC has raised some constitutional concerns about such techniques in the past. The fact that the Office has previously addressed the issue, however, will not preclude me from taking a fresh look at the question. If confirmed, I will address each legal question that comes before me with objectivity and an open mind.

Your first question poses a two-fold inquiry on the extent to which vesting decisionmaking authority in a private party encroaches upon legislative power under Article I and/or executive power under Article II. These are difficult questions involving fundamental constitutional principles. As a consequence, I am not in a position to offer an opinion on either issue without fully researching applicable authorities, reflecting upon that research, and considering all pertinent arguments. For example, it is my recollection that several of the cases that have a bearing on these issues are not necessarily consistent and would require particularly careful study.

However, without wishing to be bound, it seems to me that the constitutionality of a particular arbitral scheme under either Article I or Article II may well turn on the particular circumstances involved, including such factors as the scope of the delegation, the binding or precedential nature of a decision with respect to nonparties, the nature of the executive functions exercised, and the extent to which arbitral decisions are subject to review.

The second question assumes that I have concluded that the delegation of decisionmaking authority to private parties is unconstitutional and asks me to reconcile that conclusion with certain existing statutory schemes. As I say above, I have reached no conclusion as to the constitutionality of ADR techniques in government programs. It may well be that there would be no inconsistency between any conclusions I might reach with respect to the issues in Question 1 and the cited programs. In any event, in examining these issues, I would want to study any relevant, applicable authority under the cited programs.

The **Chairman**. There is testimony submitted by the People for the American Way who ask that they be able to, as others are able to, comment on the three judicial nominees. I ask unanimous consent that their statement be placed in the record at this time.

[Information follows:]

REPORT OF
PEOPLE FOR THE AMERICAN WAY ACTION FUND
ON THE NOMINATION OF
PAMELA ANN RYMER TO THE
NINTH CIRCUIT COURT OF APPEAL

I. Nominee's Background

Judge Rymer is a 1964 graduate of Stanford University Law School. After graduating from law school, she worked in the presidential campaign of Barry Goldwater. She then served as Vice-President of Rus Walton & Associates in Los Altos, California and later practiced law for nine years in Los Angeles with the former firm of Lillick, McHose & Charles where she specialized in business and antitrust litigation. In 1975, she left the Lillick law firm to form her own firm, Toy & Rymer, where she continued to specialize in business litigation. She practiced there until February, 1983, when she was appointed to be a Federal District Court Judge in Los Angeles.

Judge Rymer is a member of various local and national bar associations and several judicial organizations. She is Chairwoman of the California Post-Education Commission, an organization charged with planning all higher education in California. She also is a Director of the Constitutional Rights Foundation and a past president of the Wilshire Republican Club.

Judge Rymer's published writings are relatively scarce, mostly appearing in bar association journals. Several of her articles concern antitrust law and RICO.

Other than her work on the Education Commission and her membership in the Constitutional Rights Foundation, Judge Rymer identified no pro bono activities in her Biographical Questionnaire.

II. Nominee's Record

During her five years as a District Court Judge, Judge Rymer has written approximately 37 reported opinions. Overall, her opinions are thoughtful, reasoned and well written. She relies heavily on prior authority and rarely takes positions that are not supported by strong legal precedent.

Judge Rymer's reputation is as "a tough conservative judge with strong Republican connections." L.A. Times, Apr. 23, 1988. She also is noted for her tough sentences. In 1984, she sentenced a former California Highway Patrol Officer convicted under federal civil rights statutes for the murder of a woman to 90 years in prison, with no eligibility for parole for 30 years. If Judge Rymer had sentenced the defendant to life, he would have been eligible for parole in ten years. L.A. Times, Apr. 23, 1988. The Ninth Circuit upheld Judge Rymer's order. L.A. Times, June 3, 1986.

Occasionally, Judge Rymer has been reversed on appeal. In Hamner v. Rios, 769 F.2d 1404, (9th Cir. 1985), the Ninth Circuit reversed Judge Rymer's decision not to award attorney's fees (although she did determine a reasonable award) to the prevailing plaintiff in a civil rights case. Judge Rymer determined that the fact that the plaintiff and his attorney had entered into a contingent fee contract precluded an award. In reversing Judge Rymer's decision, the Ninth Circuit noted that the plaintiff's damages would have been severely reduced without an attorney's fees award. Id. at 1410.

Additionally, in Exxon Corp. v. Fischer, 807 F.2d 842 (9th Cir. 1987), amended in part, 817 F.2d 1429 (9th Cir. 1987), the Ninth Circuit reversed Judge Rymer's opinion granting summary judgment in favor of Exxon Corporation. Exxon sought a declaration to invalidate a determination by the Secretary of Commerce that the California Coastal Commission could limit exploratory oil drilling off the coast of Santa Barbara in order to protect shark fishing. Id. at 844. Judge Rymer had determined that the Coastal Commission exceeded its authority and that the Secretary was not acting in a judicial capacity so that his decision was not determinative. Id. at 845. The Ninth Circuit reversed and determined that the Secretary was acting in a judicial capacity so that Exxon could not attack his decision in a collateral proceeding. Id. at 847.

Finally, in Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511 (9th Cir. 1987), the Ninth Circuit reversed Judge Rymer's dismissal of a complaint filed pro se against the Mexican government and its employees. Judge Rymer dismissed the complaint because she found no state action by the United States, a requirement under the statute cited by the plaintiff as conferring subject matter jurisdiction upon the district courts. Id. at 1513. The Ninth Circuit determined that even though jurisdiction was not proper under the statute relied on by the plaintiff, at least two other statutes provided for subject matter jurisdiction in the district courts. Id. at 1519.

Judge Rymer has received high marks as a Federal District Court Judge. In December 1986, although she was a leading candidate to fill a vacancy on the California Supreme Court, she said she would not accept such a nomination, explaining "I love the work that I am doing and feel committed to my appointment on the Federal bench." L.A. Times, Dec. 5, 1986. Late in 1988, the Los Angeles County Bar named Judge Rymer the tenth recipient of the Los Angeles County Bar Association's Outstanding Trial Jurist Award in recognition for her "intensity, intelligence and integrity." L.A. Times, Dec. 14, 1988. When her nomination was first announced during the Reagan Administration, she received a majority ABA rating of exceptionally well qualified; a minority rated her well qualified. At the same time, Chief U.S. District Judge Manuel L. Real of Los Angeles stated, "I think she will be a great appellate judge. She's bright, dedicated and a hard worker." L.A. Times, Apr. 23, 1988.

III. Specific Issues

A. Introduction

Judge Rymer's reported rulings reveal that she has a preference for summary judgments and other dispositive motions and a preference toward institutional parties over individuals, especially in the area of criminal law, civil rights and access to justice. Judge Rymer's reported rulings also reveal that she is a thoughtful author who will follow prior decisions but who will also make known her views about certain practices. She also strictly interprets and enforces procedural requirements, often to the detriment of individual plaintiffs. [redacted] to do the same for a pro se plaintiff. As she has not written much in the area of constitutional law, it is difficult to determine her views on constitutional interpretation.

B. Criminal Law

In her reported decisions, Judge Rymer has declined to expand doctrines that favor the accused. But see discussion infra at 9, Section IV. In U.S. v. Gonzales-Mares, 752 F.2d 1485 (1985), cert. denied, 473 U.S. 913 (1985),[1] Judge Rymer, while sitting on the Ninth Circuit by designation refused to expand Miranda to apply to pre-plea, pre-sentence interviews by a probation officer obtaining information relevant to sentencing. In that case, the defendant was convicted for lying to the probation officer and to a magistrate about her prior record. Id. at 1488. Judge Rymer determined that the interview was not a custodial interview because: (a) the questions "were not directly related to the facts of the crime with which the defendant was charged", id. at 1489; (b) the defendant's responses were not being "used to help prove prior criminal activity," id.; (c) "the questions asked were not likely to elicit incriminatory responses", id.; (d) no privilege against self-incrimination exists in response to questions about probation status, id.; and (e) the responses were only used for the purposes of sentencing, id. at 1490. Additionally, although not relevant to the discussion of the main issues, Judge Rymer noted that a form supposedly allowing a defendant charged with a felony and a misdemeanor to plead guilty to the misdemeanor before a magistrate in exchange for the dismissal of the felony charge did not disclose all the facts and only stated that defendant waived the right to trial and agreed to appear for sentencing before a magistrate. Id. at 1487, n.1. Although Judge Rymer said nothing about the non-disclosure in the form, her very mention of it reveals a concern about this potential problem.

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[1] In her Questionnaire, Judge Rymer identified this as one of her ten most significant opinions.

Additionally, in one instance, Judge Rymer seemingly went out of her way to bolster the government's arguments supporting sentencing. In U.S. v. Ruelas-Armenta, 684 F. Supp. 1048 (1988), she discarded the government's argument based on a provision of the Sentencing Guideline Manual which presented definitional problems and relied on a different provision which supported the sentencing and did not have the same interpretation problems. Id. at 1051.

C. General Civil Rights Cases

In the civil rights area, Judge Rymer has generally limited herself to analysis of prior authority. See also discussion infra at 10, Section IV. In Dohner v. McCarthy, 635 F. Supp. 408 (C.D. Cal. 1985),[2] Judge Rymer determined that certain prison conditions, namely severe overcrowding, did not violate the Constitution. Although Judge Rymer expressed her dismay at these conditions, she felt constrained by prior authority to decide as she did. Id. at 425-26. At the same time, she emphasized that her decision was based on certain offsetting factors (such as "extended space" in other areas of the prison). She emphasized that if these balancing factors were eliminated, the conditions at the prison would violate the Constitution. Id. at 428.[3] She also provided detailed guidelines (or warnings) to prison officials.

Judge Rymer heavily emphasizes procedural rules and often relies on procedural error (especially failures to meet burdens of proof) to dispose of cases. In Groussman v. Respiratory Home Care, 1985 WL 5621 (C.D. Cal.), Judge Rymer narrowly interpreted the standards of summary judgment to grant a summary judgment in favor of an employer who was being sued, inter alia, for wage discrimination under the Equal Pay Act. The plaintiff alleged that she was fired and then replaced with a male employee who received a higher salary for performing substantially the same work. Id. at 1.

Although Judge Rymer was willing to analogize to Title VII to determine the allocation of the burden of proof, she was not willing to adopt the liberal requirement of Title VII to determine when the plaintiff met her burden. Id. at 7. Judge Rymer determined that the plaintiff did not meet her burden of producing "specific evidence to raise an inference" that the employer's reasons for the wage differential were not legitimate because she only produced conclusionary allegations and denials, specifically evidence only of female salaries without any evidence of male salaries. Id. at 5.

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[2] In her Questionnaire, Judge Rymer identified this as one of her ten most significant opinions.

[3] A few months earlier, in another case challenging prison conditions at the Orange County Jail, Judge Rymer ruled that "punishment tanks" at the jail were the same as "discipline isolation cells" which were subject to strict use requirements based on a settlement with the ACLU. This was a victory for the plaintiffs who were challenging the use of the "punishment tanks." L.A. Times, June 25, 1985.

Similarly in Handel v. Artukovic, 601 F. Supp. 1421 (1985), Judge Rymer dismissed a suit by relatives of Jewish citizens of Yugoslavia murdered by Croatian authorities during World War II seeking to recover damages under the Hague and Geneva Conventions against the defendant for his role in the atrocities. Id. at 1424. In the first case of this kind, Judge Rymer determined that United States District Courts do not have jurisdiction to consider claims based on the Hague and Geneva Conventions. Id. at 1426. Additionally, she dismissed related international law claims on statutes of limitations grounds, stating that the alleged crimes occurred too long ago. Id. at 1431. Finally, she refused to apply Yugoslavian law based on conflict of law grounds and unenforceability. Id. at 1436.

D. Attorney's Fees and Other Access to Court Decisions

Judge Rymer has been inclined to curtail attorneys' fees awards and has rigidly enforced procedural rules, even in pro se matters.

In Hamner v. Rios, 769 F.2d 1404 (9th Cir. 1985), the Ninth Circuit reported that in her review of attorney's fees, Judge Rymer reduced the hours of compensation because of her perception that the quality of legal research was poor and certain time spent was due merely to a failure to comply with local rules of court. Id. Additionally, although she did determine a reasonable award, she determined that she could award no attorney's fees because the plaintiff and his attorney had a contingent fee arrangement. Id. As discussed above, the Ninth Circuit reversed Judge Rymer's holding.

In Corder v. Gates, 688 F. Supp. 1418 (C.D. Cal. 1988), in calculating an attorney's fees award under a civil rights action, Judge Rymer again made a qualitative assessment of the work performed. Id. at 1420. She first multiplied the hours spent by a "reasonable" hourly rate.[4] Second, she adjusted the award downward because she felt that the plaintiffs won a much smaller figure than they could have obtained by accepting a settlement offer by the defendants. Judge Rymer found no other factors, such as injunctive relief, institutional restructuring or new principles of constitutional law, justifying any increase in the award. Id. at 1423.

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[4] Plaintiffs' counsel argued for a rate at the high end of the market range. Judge Rymer stated "although the matter was tried efficiently and ably, neither the pretrial process nor the paper work submitted throughout was quite so efficient and able," and thus, she awarded rates at the lower end of the scale. Id. at 1422-23.

In Jacobsen v. Filler, 790 F.2d 1362 (9th Cir. 1986), Judge Rymer strictly enforced procedural rules in a case involving a pro se plaintiff. The Ninth Circuit, in an opinion by Judge Rymer[5], affirmed a district court's grant of a summary judgment motion based on a pro se plaintiff's failure to file a response to defendant's summary judgment motion. Judge Rymer refused to extend the rules applicable to pro se prisoners to pro se litigants in general. She declared that notifying pro se litigants of their obligations under Federal or Local Rules would destroy courts' impartiality. Id. at 1365. Judge Rymer also emphasized that a court cannot favor a pro se plaintiff just because he chooses to represent himself, in contrast to a pro se prisoner who rarely is able to choose to be represented by counsel. Id. at 1364.[6]

Similarly, in Allison v. American Bowling Congress (ABC), 1988 WL 1256 (C.D. Cal.), Judge Rymer granted a summary judgment in favor of the defendant American Bowling Congress (ABC) in part based on the pro se plaintiff's failure to timely file his response. Judge Rymer primarily determined that the plaintiff who sued the ABC for its refusal to recognize his scores of 300 in three consecutive games, received fair process from the ABC. Id. at 5. Additionally Judge Rymer noted that the plaintiff's statement of issues failed to raise any triable issue of fact and that the plaintiff's opposition was filed four days late. Id. at 5. Judge Rymer stated that failure to timely file an opposition to a summary judgment motion may be deemed as consent to the summary judgment motion. Judge Rymer declared, moreover, that notwithstanding the merits of the summary judgment, plaintiff's failure to take any action to prosecute his case for one and a half years also evidenced his intention not to fully prosecute the case and thus dismissal for want of prosecution would also be appropriate. Id. at 16.

In contrast to Ruelas-Armenta, supra, where Judge Rymer found authority to support the government's position, in Gerritsen v. de la madrid Hurtado, supra, 819 F.2d 1511, Judge Rymer did not find obvious authority to support a pro se plaintiff's position. Judge Rymer dismissed the complaint sua sponte because she determined that subject matter jurisdiction did not exist under the statute cited by the plaintiff. Judge Rymer also did not grant the plaintiff leave to amend the complaint. Id. at 1514. As discussed above, the Ninth Circuit reversed noting that a review of subject matter jurisdiction is not limited to jurisdictional statutes identified in the complaint. It determined that at least two other federal statutes conveyed subject matter jurisdiction. Id. at 1519.

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[5] Judge Rymer sat on the Ninth Circuit by designation.

[6] Judge Reinhardt dissented and noted that pro se plaintiffs are rarely pro se by choice. Id. at 1367.

Finally, in Nilsson, Robbin, et al. v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988) the Ninth Circuit reviewed Judge Rymer's dismissal of a counterclaim and entry of a default as sanctions for a defendant's misconduct. The Ninth Court upheld Judge Rymer's ruling and praised Judge Rymer stating that "[o]n this record, Judge Rymer exercised remarkable and commandable patience liberality and fairness to the defendant." Id. at 15, n.3.

IV. Recent Additional Cases

Since she was first nominated to the Ninth Circuit in April, 1988, Judge Rymer has made a number of important recent rulings.

A. Criminal Law

(1) Tashjian Payola Case

Judge Rymer recently rejected a proposed plea agreement between the government and a husband and wife in a highly publicized payola case strongly rebuking prosecutors for pressuring the woman into pleading guilty. The woman had been threatened with more charges if she didn't plead guilty, even though she had a defense. L.A. Times, Feb. 16, 1989.

(2) Lopez-Alvarez Conspiracy to Murder U.S. Customs Agent.

Judge Rymer imposed a significantly lower sentence than had been sought by the government for three Mexicans convicted of conspiring to murder a fictional U.S. Customs agent in the same way that one of the convicted defendants (Lopez-Alvarez) had murdered a DEA agent. In doing so, Judge Rymer expressed reservations about an undercover sting operation in which a DEA agent contracted with Lopez-Alvarez for the killing, saying the prosecution "pushes the conspiracy theory to its ultimate." L.A. Times, Nov. 11, 1988.

(3) FBI investigation of fundraiser for former presidential candidate Gary Hart.

Judge Rymer ruled that David Stein, a fundraiser for Gary Hart, and a target of an FBI investigation for possible campaign finance violations, had a Fifth Amendment right to refuse to answer questions in a civil probe by the Federal Election Commission. L.A. Times, Sept. 30, 1988.

(4) Los Angeles Airport cocaine seizure case.

Judge Rymer excluded evidence obtained in a cocaine seizure at Los Angeles International Airport and suppressed incriminating statements by the man who picked up the drugs and complained he was physically abused by government agents. Judge Rymer wrote that to permit this particular seizure "would be to rewrite the Constitution . . . to sanction the warrantless search . . . . The Constitution does not require perfection, but it does prescribe a procedure that is important to society to preserve and the police to respect. All it takes is a little patience." L.A. Times, Sept. 28, 1988.

B. Civil Rights

In Doe v. Centinela Hospital, 1988 WL 81776 (C.D. Cal.), 57 U.S.L.W. 2034, the first federal case specifically addressing discrimination against AIDS virus carriers, Judge Rymer determined that the Federal Rehabilitation Act, which prohibits discrimination against the "handicapped," also protected the plaintiff, an asymptomatic AIDS virus carrier. The plaintiff sued a hospital which had excluded him from a residential drug and alcohol treatment program because he tested positive for the AIDS virus. Judge Rymer relied heavily on School Board of Nassau County v. Arline, 107 S.Ct. 1123, 94 L.Ed. 2d 307 (1987), in which the Supreme Court reviewed the firing of a teacher because she had tuberculosis. Judge Rymer interpreted Arline to hold that "discrimination based solely on fear of contagion is discrimination based on a handicap when that impairment has that effect on others." Id. at 6. Judge Rymer refused to consider whether all asymptomatic AIDS virus carriers were protected under the Federal Rehabilitation Act and she refused to decide whether the plaintiff established that the hospital's reasons for its exclusion were invalid, leaving those issues for the trial court's determination. Six months later, as part of the settlement of the case, the hospital discontinued testing patients in its residential drug and alcohol treatment program for AIDS. L.A. Times, Jan. 11, 1989.

Report of
People For The American Way Action Fund
on the Nomination of
Robert C. Bonner to the
United States District Court for the
Central District of California

I. Nominee's Background

Bonner is a 1966 graduate of Georgetown University Law School. After a federal district clerkship and four years of service in the Naval JAGC, he served as an assistant U.S. Attorney in Los Angeles from 1971-1975. He then practiced with the former Los Angeles firm of Kadison, Pfaelzer, Woodard, Quinn & Rossi for nine years, specializing in civil litigation. He has served as U.S. Attorney for the Central District of California since early 1984.

Bonner is a member of numerous local and national bar associations, an honorary member of the Los Angeles Rotary Club, and a member of the L.A. Chamber of Commerce and the Inter-Agency Council on Child Abuse and Neglect.

Bonner's published writings consist mainly of congressional testimony on business fraud, op-ed pieces, and letters to the editor.

Bonner has devoted over one half of his legal career to public service and, according to his questionnaire, considerable time to *pro bono* activities while in private practice. He cites one case (in which he represented without fee a government employee in an administrative termination hearing); service as a municipal court judge *pro tem*; and service on the Federal Bar Association's indigent defense panel and other civic committees as examples of his *pro bono* activity.

II. Nominee's Record

Bonner appears to have received generally high marks as U.S. Attorney. In a recent *Los Angeles Times* profile, he was described as an aggressive prosecutor who has brought greater visibility and professionalism to the office. Chief U.S. District Judge Manny Real said "[H]e's been independent, and that's a good quality for a U.S. attorney . . . . I'd describe him as a very good, competent U.S. attorney who's doing, I think, a very good job." *Los Angeles Times*, March 14, 1988.

Steve Trott, former head of the Justice Department's Criminal Division, stated that while he disagreed with Bonner on some issues, "I respect his views. They're the views of a professional." Id.

Tom Pollack, a respected criminal defense attorney, commented that Bonner is a "much more experienced, serious-minded prosecutor than other appointments over the past years . . . . I think he's . . . outspoken in the good sense of the term, and that is that he's thoughtful, he speaks fairly freely about what's on his mind." Id.

Bonner also appears to have earned the professional respect of defense attorneys who have opposed him in the courtroom. Stanley Greenberg, one of the defense attorneys in the Miller spy case, which Bonner personally tried, said "overall . . . [he] has done a good job" (although Miller's attorneys criticized him for questionable media tactics, see discussion infra). Howard Weitzman, John DeLorean's attorney, also praised Bonner for his conduct in the DeLorean drug trial. Id.[1]

Bonner has been credited for increasing the focus of the U.S. Attorney's Office on white-collar crime, particularly defense procurement and securities fraud, and on drug trafficking. He has spoken out frequently on these subjects and has brought charges against major defense contractors (such as Rockwell International and McDonnell Douglas) and other prominent corporations and executives. He has significantly increased resources in these areas and won dozens of convictions. Overall, 80 percent of the approximately 1,000 criminal indictments brought by the U.S. Attorney's Office each year result in guilty pleas, and approximately 98% of the cases that have gone to trial have resulted in convictions. Id.

Bonner also has made political corruption a priority of the U.S. Attorney's office. Id. He has indicted and obtained convictions of several prominent public officials (including a California assemblyman) and political contributors for corruption and campaign finance violations. Id.[2]

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[1] Although Bonner reportedly has an aloof managerial style and is not universally well-liked among his staff, id., he is highly recommended by a former Assistant U.S. Attorney, David Nimmer, who was consulted in connection with this report.

[2] The conviction of the California state legislator for receipt of corrupt payments was reversed on appeal in light of the Supreme Court's decision in U.S. v. McNally.

III. Specific Issues

While generally praised for his performance as U.S. Attorney, Bonner occasionally has been the subject of controversy and criticism. Although he has attacked political corruption, he was criticized for prosecuting only Democrats in his major corruption case, involving payments by Wallace Patrick Moriarty, a wealthy fireworks and real estate magnate, to state and local politicians. Id.[3] Additionally, in an inside trading case against Carl Karcher, a prominent Orange County Republican and founder of the Carl's Jr. hamburger chain, Bonner reportedly is the official who made the decision that criminal charges should not be brought and that Karcher should only be charged with civil violations by the SEC. Los Angeles Times, April 15, 1988. There is presently no reason to believe, however, that his failure to bring charges against Republicans in any of these political corruption cases, or to indict Karcher, was politically motivated.[4]

Bonner also has been accused of publicity-seeking. He was particularly criticized for generating allegedly prejudicial pretrial publicity in the Miller spy case. One of Miller's defense attorneys, Stanley Greenberg, accused him of using news conferences "as the first step in jury selection . . . . Rightly or wrongly, he has used his frequent news conferences to the advantage of the prosecution . . . . By having a press conference, he's conveying to the jury pool the prosecution's view of the case, and, frequently, the evidence." Los Angeles Times, March 14, 1988.

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[3] Bonner obtained convictions of Moriarty, his chief lieutenants, a Democratic state legislator, and several city councilmen. In other politically-related cases, he indicted four Democratic businessmen involved in a campaign financing scheme to aid the 1986 re-election campaign of Senator Alan Cranston (New York Times, December 15, 1988), and initiated an FBI inquiry which led to the indictment of a major supporter of 1984 Democratic presidential candidate Gary Hart for alleged campaign finance violations. New York Times, January 30 and June 10, 1988.

[4] Bonner's supporters might argue that his overall record reveals no reluctance to prosecute those who generally support and are identified with the Republican Party. They might point, for example, to his vigorous prosecution of major corporations and corporate executives for defense procurement, securities, and other types of business fraud.

Bonner was further criticized in the Miller case for seeking a gag order on the defense attorneys after he himself allegedly engaged in improper pretrial publicity.[5] The order was entered by the judge in the case, however, who criticized the defense for "lobbying" for their clients in the media. New York Times, March 6, 1985. The order was also upheld on appeal, although its scope was narrowed.

Bonner has defended himself against charges of media manipulation by asserting that his acknowledged efforts to increase the visibility of his office were not for "personal glorification . . . [it] always [has] seemed to me that a very large part of what we do in the U.S. attorney's office is calculated to achieving deterrence . . . ." Los Angeles Times, March 14, 1988.[6]

Bonner also suffered a major embarrassment in indicting General Dynamics and several of its directors (including former NASA Administrator James Beggs) for military procurement fraud, and then dropping the charges after publicly admitting that he didn't have a case. Some attribute the mistake to excessive prosecutorial zeal and poor judgment in not recognizing from the beginning that the case was weak. Beggs, whose reputation was badly damaged by the indictments, accused Bonner of close-mindedness in the pre-indictment investigation, claiming that General Dynamics officials and their attorneys were "told summarily [by Bonner and his people] they didn't want to hear from us, and that was that." New York Times, June 26, 1987. On the other hand, some say Bonner's willingness to admit error and drop the case shows that he is fair, an attorney first and an advocate second. Los Angeles Times, March 14, 1988.

Bonner's general views on constitutional issues are not readily discernible from the public record. In one instance, however, he did speak out against a California Supreme Court decision reversing a conviction on *Miranda* grounds. The Court held that a suspected drug trafficker's *Miranda* rights were violated when the police would not allow an attorney, who had been retained by the suspect's friends, to see him after the suspect had voluntarily submitted to interrogation. Bonner argued that the suspect waived his Miranda rights by agreeing to answer questions and therefore had no right to the assistance of the attorney, or even to know that the attorney was at the station and trying to see him. Bonner reasoned that attorneys in drug trafficking cases often are retained by and represent the "higher-ups" for the purpose of advising the suspect not to talk and thereby preventing disclosure of their involvement. Bonner claimed that his position was supported by U.S. Supreme Court precedent and that the California Supreme Court had wrongly decided the case. Los Angeles Times, Op-Ed., October 20, 1986.

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[5] The overall manner in which the government conducted the prosecution and trial of the case reportedly has been challenged by Miller in his pending appeal.

[6] Bonner's pursuit of publicity reportedly led him to ask a non-union TV crew to leave a press conference that was being picketed by union crews during a strike because he was concerned that its presence would discourage other crews from covering the event. Los Angeles Times, April 6, 1985.

In another matter involving a constitutional issue, that of public access to government files, Bonner's office appealed a magistrate's decision sought by the media requiring disclosure of affidavits provided by targets of government investigations. Bonner argued that the public's right of access is "by no means absolute" and that premature disclosure could damage reputations. He asserted that the media's desire for disclosure was part of a "frenzy to get this story out." Los Angeles Times, July 16, 1988.

Finally, Bonner was one of the Justice Department officials who accompanied Ed Meese on a controversial government-paid trip to Japan to attend a legal seminar last year. While still Attorney General, Meese had accepted an invitation to attend the seminar and had invited thousands of American citizens to accompany him. The trip occurred after Meese had resigned and been replaced by Attorney General Thornburgh. Thornburgh allowed Department officials (including Bonner) to make the trip at government expense, in order to avoid offending the Japanese hosts, but at the same time announced that he was tightening restrictions on Department travel not directly related to official business. The trip could not have taken place under Thornburgh's new policy. New York Times, September 2, 1988.

REPORT OF
PEOPLE FOR THE AMERICAN WAY ACTION FUND
ON THE NOMINATION OF
MELINDA HARMON TO THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

I. Nominee's Background

Melinda Harmon is currently a judge of the 280th District Court in Houston, Texas. She was appointed to that court in January 1988, after previously losing election to another judgeship in 1986. Her experience prior to assuming the state court bench included two years as a law clerk to the respected District Judge John Singleton and twelve years as a litigation attorney for the Exxon Company. She is a graduate of Radcliffe College (1969) and the University of Texas Law School (1972).

Harmon is a member of several bar associations and several philanthropic groups as well as the Houston Professional Women's Republican Club. She has had no published writings or speechs on matters of legal policy. She has held no public office other than her current judgeship on the state court.

II. Nominee's Record

In her 16 years as a member of the bar, Harmon has not been much in the spotlight. She worked her way through the ranks as an attorney at Exxon, handling a variety of litigated matters--personal injury, oil and gas, environmental suits. She did handle the defense of a number of discrimination suits for Exxon, and was well regarded for this work.

Several attorneys who have practiced against Harmon or appeared before her in court speak favorably of her work. She is viewed as poised, intelligent, and business-like in approach. She has raised no particular hackles during the course of her legal career.

III. Specific Issues

There are certainly other attorneys in Houston who have greater experience at the bar than Harmon. She practiced law for little more than 12 years, and all that time for a single client. She has served as a judge on the state court bench, but that service too has been for just over a year. Harmon has no record on civil rights or constitutional issues, and only slightly more experience with criminal law.

Prior to assuming the state court bench, Harmon did virtually no pro bono work. In the questionnaire she submitted to the Senate Judiciary Committee, she listed the following pro bono activities: writing and probating a will, examining a title, and assisting in arranging child custody in a divorce. Despite her experience as a litigator, however, she did not serve pro bono in any litigated matter. Service to the disadvantaged is one of the highest responsibilities of every member of the bar, and Harmon's record of such experience falls below what might be expected of a candidate for the federal judiciary.

The CHAIRMAN. Mr. and Mrs. Barr, I thank you for your tolerance and for staying here so late; and all of those of you who are still here for showing interest.

[The questionnaires of the nominees follow:]

PAMELA ANN RYMER

Birth:	January 6, 1941	Knoxville, Tennessee
Legal Residence:	California	
Marital Status:	Single	
Education:	1957 - 1961	Vassar College A.B. degree
	1958 (summer)	San Francisco State College
	1961 - 1963	Stanford University LL.B. degree, 1964
Bar:	1966	California
Experience:	1964	Citizens for Goldwater Committee Director of Political Research and Analysis
	1965 - 10/66	Rus Walton & Associates Vice President Los Altos, California
	1966 - 1975	Lillick, McHose & Charles Associate, 1966-1972 Partner, 1973-1975
	1975 - 1983	Toy and Rymer Partner
	1983 - present	United States District Judge Central District of California
Office:	United States Courthouse 312 North Spring Street Los Angeles, California 90012 213 461-0659	
Home:	645 North Wilcox Avenue (2-C) Los Angeles, Califonira 90004	

To be United States Circuit Judge for the Ninth Circuit

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full Name (include any former names used).

   Pamela Ann Rymer

2. Address: List current place of residence and office address(es).

   Office: United States District Court
   United States Courthouse
   312 North Spring Street
   Los Angeles, California 90012

   Home: 645 N. Wilcox Avenue (2-C)
   Los Angeles, California 90004

3. Date and place of birth.

   January 6, 1941
   Knoxville, Tennessee

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Single.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Vassar College, 1957-1961, A.B. 1961.

   San Francisco State College, summer course, 1958.

   Stanford University, 1961-1963, LL.B. 1964.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

   Director of Political Research and Analysis, Goldwater For President Committee, Citizens for Goldwater-Miller/Republican National Committee, Washington, D.C. (1964)

   Vice President, Rus Walton & Associates, Los Altos, California (1965-October 1966)

Lillick, McHose & Charles, 725 S. Figueroa Street, Suite 1200, Los Angeles, California 90017 (Associate, October 1966-1972; Partner, 1972-October 1975)

Toy and Rymer, 626 Wilshire Boulevard, Los Angeles, California (Partner, October 1975-February 1983)

United States District Judge, Central District of California (February 1983-)

The CAWML Company (Partner, approximately 1971-1974)

Vassar Club of Southern California (President, 1971-1975)

Hancock Park Terrace Condominium Association (Director (1979-1982) and President (1982))

Wilshire Republican Club (Director (1976-1982) and President, 1980-82)

Institutional Review Board, Institute for Biological Research and Development, Inc., Newport Beach, California (1982-83)

Constitutional Rights Foundation (Director, 1985-)

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

   None.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

   Member, Los Angeles County Bar Association, American Bar Association (and its Antitrust and Litigation sections); the State Bar of

California; Federal Bar Association. Former member: Association of Business Trial Lawyers; Los Angeles Copyright Society.

Chairman, Antitrust Section, Los Angeles County Bar Association (1981-82) and member of its executive committee. Member: Los Angeles Delegation, State Bar Conference of Delegates (1982); and of the following committees of the Los Angeles County Bar Association: Judicial Appointments Committee (1979-82); Federal Courts Practice Standards Committee and Chairman, Subcommittee on Peer Review and Counseling (1980-83).

Member: Federal Judicial Center Committee on Summer Educational Programs (1987-); Executive Committee of the Ninth Circuit Judicial Conference and Chairman, Subcommittee on Resolutions (1987-); Ninth Circuit Committee on Technology (1985-); Executive Committee, Central District (1985; 1987).

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Member: Education Commission of the States, Task Force on State Policy and Independent Higher Education (1987-); Federal Judges Association (1987-).

Member: Board of Visitors, Stanford Law School (1986-); Board of Visitors, Pepperdine Law School (1987-); Board of Directors, Constitutional Rights Foundation (1985-); District Judges Association; Vassar Club of Southern California; Stanford Law Society of Southern California; Stanford Alumni Association; The Smithsonian Associates; First Presbyterian Church of Hollywood.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court, California (1966)

Ninth Circuit Court of Appeals (1966)

United States District Court, N.D. Calif. (1966)

United States District Court, C.D. Calif. (1966)

United States Supreme Court (1971)

United States District Court, D. Utah for purposes of pending case (approximately 1973)

Tenth Circuit Court of Appeals (1973)

United States District Court, S.D. Fla. for purposes of pending case (approximately 1974)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please suppy them.

"The Economist as an Expert Witness in Antitrust Litigation," Los Angeles Bar Journal, September, 1976 (copy attached)

"A Trial Lawyer's Problem in Antitrust," Association of Business Trial Lawyers, February 18, 1976 (summary of leading cases, not policy oriented; copy no longer available)

"Computers in Chambers," 1 Federal Bar Ass'n J. #2 (Spring 1985) (copy attached)

"Interview: Sanctions--The Views from Both Sides of the Bench," VII ABTL Report #3 (April 1985) (copy attached)

"Forward to the Past--Or, When Do Predicate Acts a Pattern Make," 4 Trial Lawyers Section-Newsletter #1 (Spring 1986) (copy attached)

Other than these published materials, I have given no speeches on issues involving

constitutional law or legal policy, nor am
I aware of any press reports on such
matters.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent.
1986.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

United States District Judge (2/28/83-). Presidential appointment. Court of limited jurisdiction.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Citations for opinions:

O.S.C. Corporation v. Apple Computer, 601 F.Supp. 1274, aff'd, 792 F.2d 1464 (9th Cir. 1986).

In re Paradise Holdings, 619 F.Supp. 21 (D. Hawaii 1985), aff'd, 795 F.2d 756 (9th Cir. 1986).

Metromedia Broadcasting v. MGM/UA Entertainment, 611 F.Supp. 415 (C.D. Cal. 1985).

United States v. Kouyoumdjian, 601 F.Supp. 1506 (C.D. Cal. 1985).

Handel v. Artukovic, 601 F.Supp. 1421 (C.D. Cal. 1985).

Dohner v. McCarthy, 635 F.Supp. 408 (C.D. Cal. 1985).

Allington v. Carpenter, 619 F.Supp. 474 (C.D. Cal. 1985).

Medallion TV Enterprises, Inc. v. Selectv of California, 627 F.Supp. 1290, aff'd, 833 F.2d 1360 (9th Cir. 1987).

Roberson v. Equitable Life Assurance Society of the United States, 661 F.Supp. 416 (C.D. Cal. 1987).

United States v. Gonzalez-Mares, 752 F.2d 1485 (9th Cir. 1985).

(2) Appellate opinions reversing my decision:

Carpenters Southern California Administrative Corporation v. Majestic Housing, 743 F.2d 1341 (9th Cir. 1984)(reversing exercise of removal jurisdiction based on labor law preemption on ground that claim was not properly characterized as raising federal question).

Hamner v. Rios, 769 F.2d 1404 (9th Cir. 1985)(reversed in part with respect to calculation of attorneys' fees award).

Bulthuis v. Rexall, 777 F.2d 1353, 786 F.2d 368, 789 F.2d 1315 (9th Cir. 1985) (reversing summary judgment on ground expert opinion even without factual basis suffices to raise triable issue).

Moeller v. Ionetics, Inc., 794 F.2d 653 (Fed. Cir. 1986)(reversing summary judgment in action for patent infringement on ground that expert opinion would be helpful).

Bryant v. Ford Motor Co., 794 F.2d 450 (9th Cir. 1986), reh. en banc, 832 F.2d 1080 (9th Cir. 1987), pet. for reh. by full court pending (reversing grant of summary judgment after exercise of removal jurisdiction in "Doe" pleading case).

Exxon Corporation v. Fischer, 807 F.2d 842 (1987)(reversing and remanding for entry of judgment for defendant on ground of preclusive effect of administrative proceeding).

Gerritsen v. Miguel De La Madrid Hurtado, 819 F.2d 1511 (9th Cir. 1987)(reversing dismissal of complaint against Mexican officials for lack of § 1983 subject matter jurisdiction, on ground of failure sua sponte to suggest possible claims for relief over which there might be jurisdiction).

[My judgment in New England Reinsurance Corp. v. National Union Fire Ins. Co., 654 F.Supp. 742 (C.D. Cal. 1986) was originally reversed in an opinion reported at 822 F.2d 887 (9th Cir. 1987), but subsequently vacated, op withdrawn, reh gr, 829 F.2d 840 (9th Cir. 1987)(intrepretation of insurance policy).]

So far as I recall there have been no instances of a judgment being affirmed with criticism of substantive or procedural rulings.

(3) Opinions on constitutional issues.

United States v. Kouyoumdjian, 601 F.Supp. 1506 (C.D. Cal. 1985).

Dohner v. McCarthy, 635 F.Supp. 408 (C.D. Cal. 1985).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Member, California Postsecondary Education Commission (appointed by Governor Reagan, 1974 for a four-year term and reappointed by Governor Brown, 1978 for a six-year term) and its Vice-Chairman for three years and Chairman for four years (elected by commissioners).

No candidacies for elective public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you

were a clerk;

No.

2. whether you practiced alone, and if so, the addresses and dates:

No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

1966-75: Lillick, McHose & Charles, 725 South Figueroa Street, Suite 1200, Los Angeles, California 90017. Associate (1966-72) and Partner (1973-10/75).

10/75-2/83: Toy and Rymer, 626 Wilshire Boulevard, Los Angeles, California 90017. Partner.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Business litigation.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Typically represented business organizations, with particular concentration in antitrust and problems unique to the automobile industry at wholesale and retail.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Occasionally.

2. What percentage of these appearances was in:

(a) federal courts -- 40%

(b) state courts of record -- 55%
(c) other courts -- 5%

3. What percentage of your litigation was:
    (a) civil -- 100%
    (b) criminal -- 0% (excluding a number of government enforcement proceedings which did not result in criminal litigation)

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

    Approximately six cases as sole counsel; two as chief counsel; and three as associate counsel.

5. What percentage of these trials was:

    (a) jury -- 70%
    (b) non-jury -- 30%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    (a) the date of representation;
    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
    (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) Beverage Distributors, Inc. v. Olympia Brewing Co., United States District Court for the Northern District of California, 440 F.2d 21 (9th Cir. 1971), cert. denied, 403 U.S. 906. Action by terminated distributor to recover treble damages under the antitrust laws, and for injunctive relief. At issue were Olympia's territorial or customer restrictions, alleged to have been enforced to prevent plaintiff from distributing Olympia beer to any customer other than Safeway by delivery to the customers' central warehouse; adoption of a fair trade program allegedly to prevent plaintiff from selling at discount; alleged participation in a boycott among brewers to force plaintiff

to observe territorial and customer restrictions; and refusal to deal with plaintiff. The action was the first "Schwinn" case tried after the Supreme Court's decision in United States v. Arnold, Schwinn & Co. Our client was the defendant, Olympia Brewing Company. I was associate counsel with responsibilities which included law and motion matters, briefing, trial organization and preparation (including drafting of and arguing instructions); and was present and participated actively throughout the pre-trial proceedings, hearings on preliminary injunction, trial and appeal. The case was tried for approximately six weeks in the fall of 1969, to a jury, which returned a verdict in Olympia's favor. The trial judge was the Honorable William T. Sweigert. The Ninth Circuit affirmed and plaintiff's Petition for a Writ of Certiorari was denied.

Counsel for plaintiff:

Benjamin H. Parkinson, Jr.
Ackerman, Johnston, Campbell & Parkinson
333 Market Street
San Francisco, California
415-777-3999

Co-counsel:

David Brice Toy (then of Lillick, McHose & Charles)(chief trial counsel)
Law Offices of David Brice Toy
626 Wilshire Boulevard
Los Angeles, California
213-629-0101

(I was primarily responsible for defense of a related case, Ralph's Grocery Co. v. Olympia Brewing Co., in the United States District Court for the Central District of California before the Honorable William M. Byrne, Jr. Essentially similar issues were involved, but other brewers were named as defendants in addition to Olympia. The matter was ultimately settled favorably to Olympia. Counsel in this proceeding included William McD. Miller and Robert Wilson, then of Hill, Farrer and Burrill for plaintiff; Jess O'Malley, Musick, Peeler & Garrett; and George Christensen, Overton, Lyman & Prince, all in Los Angeles.)

(2) Virginia Richmond v. Joseph Schlitz Brewing Co., et al., United States District Court for the Central District of California. This was a copyright infringement action in which plaintiff claimed infringement of her copyrighted music by the jingle, "When You're Out of Schlitz, You're Out of Beer." I represented the defendants (the Leo Burnett Agency being the principal one). Except for early depositions, I had responsibility for all discovery,

development of expert testimony, pre-trial and trial; and was the chief trial counsel. The matter was tried to a jury for approximately two weeks and a verdict returned in favor of defendants. The trial judge was the Honorable Irving Hill. The Ninth Circuit affirmed judgment entered on the jury's verdict.

Counsel for plaintiff:

Willard Horwich
1925 Century Park East
Ste. 1860
Los Angeles, California 90067
213-556-3378

Co-counsel:

Kenneth E. Kulzick (then with Lillick, McHose & Charles)
Liebig & Kulzick
626 Wilshire Boulevard
Los Angeles, California 90017
213-623-7070

Charles W. Cappel (then with Lillick, McHose & Charles)
213-476-3593

(3) Nicolai Joffe Corporation v. Wayne, Superior Court for the County of Los Angeles. This action arose out of the purchase of a sailing vessel and in pertinent part concerned the role of John C. McHose, a senior partner of Lillick, McHose & Charles, in the transaction. The defendant cross-complained against McHose and at issue were an alleged conflict of interest and the "equal dignity" rule. I represented McHose and Lillick, McHose & Charles; I was responsible for all discovery, pre-trial and trial. The matter was tried in 1974 to the Honorable Alfred L. Margolis and resulted in a judgment in favor of McHose.

Counsel for cross-complainant:

Robert H. Tourtelot
2049 Century Park East
Los Angeles, California
213-552-3332

(4) Sherman Oaks Cycles, Inc. v. Otobai, Inc., Superior Court for the County of Los Angeles. This was an action under the California Unfair Trade Practices Act, alleging sales below cost and other acts of unfair competition. It involved the retail sale of new Honda motorcycles and particularly, discounting in the relevant market. I was sole counsel for Otobai, Inc, dba Honda of Pasadena.

Preliminary injunction proceedings were heard by the Honorable Harry Hupp; the trial judge was the Honorable Frank Wickham. Trial was to a jury which was unable to reach a verdict; a mistrial was declared and the matter was thereafter settled.

Counsel for plaintiff:

David Laufer
Kindel & Anderson
5959 Topanga Canyon Blvd.
Woodland Hills, California 91367
818-712-0036

Counsel for co-defendant:

George W. Humphries
Crane & Humphries
517 E. Wilson Avenue
Glendale, California 91206
818-246-8371

(5) Catalano v. Target Sales, Inc., United States District Court for the Eastern District of California, 605 F.2d 1097 (9th Cir. 1979), 446 U.S. 643 (1982). This was a class action by retailers of beer in the Fresno area against Fresno wholesale beer distributors, seeking treble damages and injunctive relief under the antitrust laws on account of their allegedly agreeing to withdraw credit and to sell only on a cash basis. The case was the first to present the issue of "credit-fixing" and whether the arrangement to sell only on a COD basis should be analyzed under the per se rule. My client was Target Sales, Inc., for whom I was sole counsel. The matter was assigned to the Honorable Myron D. Crocker; the district court ruling that the issue should be resolved under the rule of reason was affirmed by the Ninth Circuit (opinion per Judge Sneed), but plaintiffs' petition for certiorari was granted and the Supreme Court simultaneously reversed without argument. Defendants' petition for rehearing was denied and the matter was settled.

Counsel for plaintiffs:

William L. Riley
Orrick, Herrington & Sutcliffe
600 Montgomery Street
San Francisco, California
415-392-1122

Counsel for co-defendants:

Jon Wallace Upton
Kimble, Macmichael, Jackson & Upton

4201 West Shaw Avenue
Fresno, California 93722
209-275-5200

G. Richard Doty
McCutchen, Black, Verleger & Shea
600 Wilshire Boulevard
Los Angeles, California
213-624-2400

Ted R. Frame
Frame & Allen
201 Washington
Coalinga, California 93210
209-935-1552

(6) Clayton Mfg. Co. v. Cline, United States District Court for the Central District of California. Plaintiff sought treble damages under the antitrust laws on account of an agreement by which the inventor of the dynamometer assigned his patent rights to Clayton in return for royalties which allegedly related to products on which patents had expired as well as to those covered by existing patents. The case presented an unusual issue of overlap between the doctrine of patent misuse and the antitrust laws. The complaint was dismissed without prejudice by the Honorable Harry Pregerson. Although other counsel were involved in this and related state court proceedings, I was solely responsible for the federal court action and antitrust issues in the state court action.

Counsel for plaintiff:

Harold L. Jackson
Jackson & Jones
17592 Irvine Boulevard
Tustin, California 92680
714-832-2080

Co-counsel:

E. Roderick Cline
Christie, Parker & Hale
350 W. Colorado Blvd.
Pasadena, California 91109
818-795-5843

(7) Swimmer v. Willcox Baringer & Co. (California) Inc., Santa Barbara County Superior Court; Kohler v. Willcox Baringer & Co. (California) Inc., San Joaquin County Superior Court; Bains v. Willcox Baringer & Co. (California) Inc., Sutter County Superior Court; Owens v. Willcox Baringer & Co. (California) Inc., Nevada County Superior Court; In the Matter of National Multiple

Employers Foundation Trust, In Bankruptcy, United States District Court for the Northern District of California. These were related actions arising out of the bankruptcy of the National Multiple Employers Foundation, which claimed to be an ERISA trust providing a multiple employer health benefit plan. My client, for which I was sole counsel, was Willcox Baringer & Co. (California) Inc., a reinsurance intermediary which placed reinsurance on the NMEF and was a "target" defendant. Numerous cross-actions were filed and together they raised novel issues involving comparative fault and indemnity, reinsurance, ERISA, and fiduciary responsibility. My client was dismissed in Swimmer on demurrer sustained without leave to amend; judgment was entered in its favor on motion for summary judgment on all causes of action for indemnity. The remaining matters were ultimately settled.

Counsel for the principal parties:

T. D. Bolling, Jr.
Charlotte Hemker-Smith,
Bolling, Walter & Gawthrop
7919 Folsom
Sacramento, California 95826
916-386-0777

Laurie Richards Shoch
Augustini, Wheeler & Dorman
523 W. Sixth Street, Ste. 330
Los Angeles, California 90014
213-629-8888

Robert F. Hulse, Jr.
Halde & Hulse
924 Anacapa Street
Santa Barbara, California
805-963-8722

Howard K. Morehouse
874 Fourth Street
San Rafael, California
415-454-4343

Ray W. Sherman, Jr.
Sherman & Feller
1970 Broadway
Oakland, California
415-452-3222

Gary R. Johnson
Haims, Johnson, Macgowan & McInerney
490 Grand Avenue
Oakland, California
415-835-0500

(8) Oliker v. Gershunoff & Silk; Bakman Ownership Company v. Oliker, Superior Court for the County of Los Angeles. This was an action for partnership dissolution and accounting involving a dispute among general partners of more than one hundred limited partnerships. Plaintiff filed notices of lis pendens on real property owned by the limited partnerships, which were my clients. At issue was the untested right of a putative general partner to record a lis pendens on property owned by the partnership when his status as a partner was in dispute. Proceedings (which occurred in 1979 and 1980) included motions to expunge (granted by the Honorable Richard F. C. Hayden); writ of mandate to the Court of Appeal, argued before and upheld per opinion by Kaus, P.J.; petition for hearing in the California Supreme Court, which was denied; receivership and injunction proceedings (denied by the Honorable Vernon G. Foster); and hearings on demurrer to complaint for abuse of process (granted by the Honorable John L. Cole).

Counsel for plaintiff:

Thomas P. Laffey
Folger & Levin
1900 Avenue of the Stars
Los Angeles, California
213-556-3700

Counsel for co-defendants:

Edward J. Costello, Jr.
Proskauer, Rose, Goetz & Mendelsohn
2121 Avenue of the Stars
Los Angeles, California
213-284-5662

(9) Connecticut Mutual Life Insurance Company v. Old Equity Mutual Life Insurance Company, United States District Court for the Eastern District of Illinois. Plaintiff sought damages and an injunction for alleged violations of the Securities Exchange Act of 1934, and for fraud and breach of contract. My clients were Old Equity and its principal policyholder and President, G. Sydney Barton, for whom I was chief counsel. The case raised the novel issue of whether the purchase of a Guaranty Fund Certificate (treated as capital in a mutual life insurance company) is a security for purposes of the securities laws. Proceedings included motions to dismiss; to disqualify Keck, Mahin & Cate from representing plaintiff on account of a conflict of interest; and for injunctive relief. After extensive discovery and before a decision was rendered on the motion to dismiss by Judge Aspen, the matter was settled.

Counsel for plaintiff:

James G. Hiering, Jr.
Keck, Mahin & Cate
233 South Wacker Drive
Chicago, Illinois 60606
312-876-3414

Local counsel for defendants:

William J. Gibbons
Latham & Watkins, Hedlund, Hunter & Lynch
233 South Wacker Drive
Chicago, Illinois
312-876-7706

(10) *Lerner Oil Co./Hudson Oil Co. v. Macmillan Ring-Free Oil Co.*, United States District Court for the Central District of California and Superior Court for the County of Los Angeles. This was an action for treble damages under the antitrust laws involving alleged price-fixing in the wholesale rebrand market. My partner David Brice Toy was principally responsible for defense of Macmillan Ring-Free; as co-counsel I assumed responsibility for certain areas of the litigation including development of economic and accounting evidence on which we took the lead. The matter was settled before trial.

Counsel for plaintiff:

Maxwell M. Blecher
Blecher & Mendel
8920 Wilshire Boulevard
Beverly Hills, California 90212
213-652-4602

Counsel for co-defendants:

John H. Brinsley
Paul, Hastings, Janofsky & Walker
555 South Flower Street
Los Angeles, California 90071
213-620-1240

Max L. Gillam
Latham & Watkins
555 South Flower Street
Los Angeles, California
213-485-1234

Ernest J. Getto
Latham & Watkins
555 South Flower Street
Los Angeles, California

213-485-1234

John Dickey
Sullivan & Cromwell
125 Broad Street
New York, New York
212-558-3802

Dennis A. Kendig
Sachs & Phelps
2121 Avenue of the Stars
Los Angeles, California 90067
213-551-8200

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

Other than the matters listed in Item No. 18, I developed and presented antitrust compliance programs for various manufacturing and distribution organizations; handled numerous matters before the California New Motor Vehicle Board; and was counsel to several companies and individuals who were under investigation for violation of the federal antitrust and securities laws, including representation in connection with grand jury proceedings.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   Buy-out agreement from my partnership in Toy and Rymer, based on (a) capital account (b) one-half cash value of work in progress and (c) one-half cash value of fees receivable, fixed as of the effective date of my withdrawal and dissolution of the partnership. The capital account was paid within 30 days and the balance was to be paid in 36 monthly installments with interest at 9 per cent. There is an outstanding balance (principal and interest) of approximately $122,000.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I automatically recuse myself from any proceeding in which the Law Office of David Brice Toy is counsel of record and shall always do so. It has been my practice to recuse myself from matters on which Lillick, McHose & Charles are attorneys of record. Finally, there is a potential conflict of interest in any matter relating to the California Postsecondary Education Commission; I would recuse myself from any such proceeding. I cannot foresee any other likely areas of concern.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Copies of my Financial Disclosure Report for calendar year 1986, and the Report I shall file for calendar year 1987, are attached.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

Attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Director of Political Research & Analysis, Goldwater for President Committee and Citizens for Goldwater-Miller/Republican National Committee. 1964 Presidential campaign. Candidate was Barry Goldwater. My responsibilities included news analysis, polling, and organizational research for the Republican National Convention.

As Vice President of Rus Walton & Associates, I was involved in several campaigns. Those that I recall were the Steiger (Wisconsin), Kline (California) and McCloskey (California) campaigns for Congress in 1965-66. My responsibilities were primarily speech-writing and public relations.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   My overriding commitment has been to education. I was a founding member of the California Postsecondary Education Commission and served on the Commission for ten years. I was its Chair for four years. During that time I devoted no less than one day a week to that responsibility, and have continued to maintain an active involvement in educational concerns. I presently serve on the Board of Directors of the Constitutional Rights Foundation and support its various activities for young people.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

   No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

   So far as I know there is no selection commission, however I am aware that there is a committee which makes recommendations to Senator Wilson about candidates for nomination to the federal courts. I have no knowledge that it has taken any action with respect to my nomination.

   I was asked to, and did meet with various officials of the Department of Justice, once in 1985 and again in 1986. I have also talked with Stephen J. Markman, Assistant Attorney General for Legal Policy, on a couple of occasions. At the request of the Department I responded to a Personal Data Questionnaire for the Standing Committee on Federal Judiciary of the American Bar Association, and furnished a copy to the Department. I was interviewed by that Committee's designee, and by an agent of the Federal Bureau of Investigation. I have also responded to a standard Department of Justice request for information concerning financial disclosure and conflicts of interest, and asked my doctor to certify my physical and mental fitness to serve as a federal judge. I am unaware of any other circumstances which led to my nomination.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

   No discussion has occurred that I reasonably interpreted as seeking assurances of my position on any case, legal issue or question; nor was any given.

5. Please discuss your views on the following criticism involving "judicial activism."

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

   Some of the characteristics of this "judicial activism" have been said to include:

   a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

   b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

   c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

   d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I believe that the primary function of the judiciary is to interpret and apply law as enacted, not to determine public policy or to do more than is necessary by way of remedy. The court system is institutionally best suited for the adjudication of explicit controversies and for arriving at a just result on a particular set of facts, rather than for the solution of general societal problems. For the same reason I believe the judiciary should be reluctant to fashion relief which requires a court to assume administrative responsibilities more appropriately borne by institutions most directly involved; or which goes beyond the set of facts at issue, or the parties before the court, to impose broad affirmative duties on other institutions or agencies of government. Finally, both as a matter of philosophy and sound judicial policy it is my view that the federal courts should strictly construe their jurisdiction and insist that jurisdictional requirements such as standing and ripeness be met.

ROBERT C. BONNER

Birth:	January 29, 1942	Wichita, Kansas
Legal Residence:	California	
Marital Status:	Married	Kimiko Tanaka Bonner one child
Education:	1959 - 1961	Wichita State University
	1961 - 1963	Maryland University B.A. degree
	1963 - 1966	Georgetown University Law School J.D. degree
Bar:	1967 1968	District of Columbia California
Military Service:	1967 - 1971	United States Naval Reserve Judge Advocate General Corps
Experience:	1966 - 1967	Law Clerk to the Honorable Albert L. Stephens, Jr. United States District Court Central Dist. of California
	1971 - 1975	Assistant U. S. Attorney Central Dist. of California
	1975 - 1984	Kadison, Pfaelzer, Woodward, Quinn & Rossi Associate, 1975-1977 Partner, 1978-1984
	1984 - present	United States Attorney Central Dist. of California
Office:	1296 United States Courthouse 312 North Spring Street Los Angeles, California 90012 213 894-2400	
Home:	595 Covington Place Pasadena, California 91105	

To be United States District Judge for the Central District of California

SENATE JUDICIARY COMMITTEE'S
QUESTIONNAIRE FOR JUDICIAL NOMINATION

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

ROBERT CLEVE BONNER (NICKNAME: "ROB")

2. Address: List current place of residence and office address(es).

RESIDENCE: 595 COVINGTON PLACE
PASADENA, CALIFORNIA 91105

OFFICE: UNITED STATES ATTORNEY'S OFFICE
1269 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

3. Date and place of birth.

JANUARY 29, 1942 -- WICHITA, KANSAS

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

MARRIED. KIMIKO (NMN) TANAKA
OCCUPATION: HOMEMAKER

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

LAW SCHOOL	DATES	DEGREE
GEORGETOWN UNIVERSITY (LAW SCHOOL)	9/63 - 6/66	J.D.

UNDERGRADUATE	DATES	DEGREE
MARYLAND UNIVERSITY	9/61 - 6/63	B.A. (MAGNA CUM LAUDE)
WICHITA STATE UNIVERSITY	9/59 - 6/61	----

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

UNITED STATES ATTORNEY CENTRAL DISTRICT OF CALIFORNIA	2/84 - PRESENT
KADISON, PFAELZER, WOODARD, QUINN & ROSSI	10/75 - 2/84
ASSISTANT U.S. ATTORNEY (U.S. ATTORNEY'S OFFICE, CENTRAL DISTRICT OF CALIFORNIA)	3/71 - 10/75
U.S. NAVY, JAGC	11/67 - 1/71
LAW CLERK, U.S. DISTRICT JUDGE ALBERT LEE STEPHENS	8/66 - 9/67

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

YES. ACTIVE DUTY U.S. NAVY 10/67 - 1/71.

ENTERED NAVY AS LIEUTENANT J.G., JUDGE ADVOCATE GENERAL CORPS, U.S. NAVAL RESERVE

RELEASED FROM ACTIVE DUTY AS LIEUTENANT, JUDGE ADVOCATE GENERAL CORPS, U.S. NAVAL RESERVE

MEMBER, U.S. NAVAL RESERVE (INACTIVE)
CURRENT RANK: LIEUTENANT COMMANDER

SERIAL NO. 723068/2505

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

RECIPIENT OF FIVE AMERICAN JURISPRUDENCE AWARDS WHILE AT GEORGETOWN UNIVERSITY LAW SCHOOL.

LYONS CLUB SPECIAL AWARD FOR DEDICATION TO LAW ENFORCEMENT

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

FEDERAL BAR ASSOCIATION
PRESIDENT, LOS ANGELES CHAPTER (1982 - 83)

AMERICAN COLLEGE OF TRIAL LAWYERS

LAWYER DELEGATE -- NINTH CIRCUIT JUDICIAL CONFERENCE, 1981-1988.

DELEGATE, CALIFORNIA STATE BAR CONFERENCE, 1982-1983.

LOS ANGELES COUNTY BAR ASSOCIATION
  MEMBER, FEDERAL COURTS AND PRACTICES COMMITTEE
  MEMBER, FEDERAL PRACTICE STANDARDS COMMITTEE

AMERICAN BAR ASSOCIATION
  MEMBER, ANTITRUST SECTION

LOS ANGELES CHAMBER OF COMMERCE
  LAW AND JUSTICE COMMITTEE

LOS ANGELES COUNTYWIDE CRIMINAL JUSTICE COORDINATING COMMITTEE

INTER-AGENCY COUNCIL ON CHILD ABUSE AND NEGLECT

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies.

NONE.

Please list all other organizations to which you belong.

HONORARY MEMBER, LOS ANGELES ROTARY CLUB

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for

11. (CONTINUED)

any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

DISTRICT OF COLUMBIA BAR _CIRCA_ 12/66

CALIFORNIA BAR _CIRCA_ 12/67

U.S. SUPREME COURT, 1981

U.S. COURT OF APPEALS

NINTH CIRCUIT, 1971

TENTH CIRCUIT, 1980

FOURTH CIRCUIT, 1981

U.S. DISTRICT COURTS

CENTRAL DISTRICT OF CALIFORNIA, 1971

NORTHERN DISTRICT OF CALIFORNIA, 1981

SOUTHERN DISTRICT OF CALIFORNIA, 1982

COURT OF MILITARY APPEALS, 1968

12. Published Writings: List the titles, publishers, and dates of books, aricles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutionl law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

EMORY LAW JOURNAL, "A BALANCED PERSPECTIVE ON ATTORNEY SUBPOENAS", VOLUME 36, SUMMER 1987, NUMBER 3 (ATTACHED)

12. (CONTINUED)

CORPORATE LAW DEPARTMENTS SECTION NEWSLETTER, LOS ANGELES COUNTY BAR ASSOCIATION, "CORPORATE CRIMINAL LIABILITY: CAN ANYTHING BE DONE TO REDUCE YOUR COMPANY'S EXPOSURE?", VOLUME 14, APRIL 1988. (ATTACHED).

TESTIMONY BEFORE HOUSE BANKING COMMITTEE ON JUNE 13, 1987, REGARDING BANK FRAUD IN SOUTHERN CALIFORNIA. (PREPARED STATEMENT ATTACHED)

TESTIMONY BEFORE SENATE COMMITTEE ON FEBRUARY 27, 1986 REGARDING AMENDMENTS TO THE ANTI-KICKBACK STATUTE (PREPARED STATEMENT ATTACHED)

TESTIMONY BEFORE HOUSE COMMITTEE ON JANUARY 27, 1988 REGARDING SECURITIES LAWS IN LIGHT OF THE ZZZZ BEST SECURITIES FRAUD CASE. (PREPARED STATEMENT ATTACHED)

LOS ANGELES ROTARY CLUB, "THE DRUG PROBLEM: A TWO-TIERED STRATEGY" (ATTACHED)

BICENTENNIAL SPEECH ON THE U.S. CONSTITUTION DELIVERED AT THE NINTH CIRCUIT'S BICENTENNIAL DAY CEREMONIES (ATTACHED)

TESTIMONY BEFORE HOUSE SUBCOMMITTEE ON CRIMINAL JUSTICE ON JUNE 6, 1988 REGARDING LOS ANGELES STREET GANGS (PREPARED STATEMENT ATTACHED)

LOS ANGELES TIMES ARTICLE ENTITLED "FIGHTING THE GOOD FIGHT AGAINST DRUGS, . . .," PUBLISHED JUNE 12, 1988 (ATTACHED)

13. Health: What is the present state of your health? List the date of your last physical examination.

EXCELLENT. MAY 1988.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

NONE, EXCEPT WHILE ON ACTIVE DUTY IN THE U.S. NAVY, I WAS APPOINTED AS A MILITARY JUDGE FOR SPECIAL COURTS MARTIAL. THIS, HOWEVER, WAS NOT MY PRIMARY DUTY.

15. Citation: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed iwth significant criticism or your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appeallate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

NOT APPLICABLE.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed.

    (1) APPOINTED AS THE UNITED STATES ATTORNEY FOR THE CENTRAL DISTRICT OF CLAIFORNIA. (JANUARY 1984 - PRESENT)

    (2) APPOINTED AS AN ASSISTANT U.S. ATTORNEY IN THE CENTRAL DISTRICT OF CALIFORNIA. (MARCH 1971 - OCTOBER 1975)

    State (chronologically) any successful candidacies for elective public office.

    NONE.

17. Legal Career

    a. Describe chronologically your law practice and experience after graduation from law school including:

        1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

            YES. SERVED AS LAW CLERK TO UNITED STATES DISTRICT JUDGE ALBERT LEE STEPHENS, JR., U.S. DISTRICT COURT FOR CENTRAL DISTRICT OF CALIFORNIA, AUGUST 1966 TO SEPTEMBER 1967.

        2. whether you practiced alone, and if so, the addresses and dates;

            NOT APPLICABLE.

        3. the dates, names and addresses of law firms of offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

            UNITED STATES ATTORNEY 2/84 - PRESENT
            CENTRAL DISTRICT OF CALIFORNIA
            312 NORTH SPRING STREET
            LOS ANGELES, CA 90012

17. (CONTINUED)

KADISON, PFAELZER, WOODARD, QUINN & ROSSI 10/75 - 2/84
707 WILSHIRE BOULEVARD - 40TH FLOOR
LOS ANGELES, CA 90017

ASSISTANT U.S. ATTORNEY 3/71 - 10/75
U.S. ATTORNEY'S OFFICE
CENTRAL DISTRICT OF CALIFORNIA
312 NORTH SPRING STREET
LOS ANGELES, CA 90012

U.S. NAVY, JAGC 10/67 - 1/71

LAW CLERK TO THE 8/66 - 9/67
HONORABLE ALBERT LEE STEPHENS, JR.
U.S. DISTRICT JUDGE
312 NORTH SPRING STREET
LOS ANGELES, CA 90012

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

LAW CLERK TO FEDERAL DISTRICT JUDGE 8/66 - 9/67
Extensive preparation of legal memoranda for U.S. District Judge for civil law and motion matters and trial issues. Drafted some memoranda opinions. Consulted with Judge, researched and advised regarding legal issues.

NAVY JAGC 10/67 - 1/71
Defended and prosecuted numerous general and special courts martial cases at Fifth Naval District in Norfolk (approximately 18 months).

Legal officer on board aircraft carrier USS Franklin D. Roosevelt (CVA 42) (approximately 18 months).

Appointed a Military Judge *circa* 1970. Was presiding officer in one or two courts martial.

17. (CONTINUED)

ASSISTANT U.S. ATTORNEY 3/71 - 10/75
Served in the Criminal Division of the United States Attorney's Office for the Central District of California for approximately 4 1/2 years. As a federal prosecutor, I tried over 40 cases in the federal district court; the vast majority of which were jury trials. I also briefed and argued numerous cases before the Ninth Circuit.

For the last 2 1/2 years in the U.S. Attorney's Office, I served as an Assistant Chief of the Criminal Division. In addition to my own cases, I supervised approximately 10-12 other Assistant U.S. Attorneys.

PRIVATE LAW FIRM PRACTICE 10/75 - 2/84
I was a member of the Litigation Department of Kadison, Pfaelzer, Woodard, Quinn & Rossi, a 75-lawyer law firm in downtown Los Angeles.

At Kadison, Pfaelzer, the vast bulk of my practice was civil litigation, particularly in the areas of business, commercial, contract and antitrust litigation. However, I also handled a number of tort matters, e.g., architect, engineering and lawyer malpractice, as well as several personal injury cases. My civil cases were divided about evenly between federal and state court. I also represented clients in white collar criminal defense matters, nearly all of which were in federal court.

The categories of my clients in private practice included corporations, developers, small banks, engineering firms, architects, lawyers, entrepreneurs, and other individuals involved in litigation.

UNITED STATES ATTORNEY FOR THE CENTRAL DISTRICT OF CALIFORNIA 2/84 - PRESENT
As United States Attorney, my responsibilities include overseeing both federal criminal and civil actions involving the United States. The civil actions include, *inter alia*, federal tort claims, *Bivens* suits, environmetal enforcement and clean-up cost recovery suits, real property disputes, False Claims Act cases, Title VII actions and civil forfeiture cases. The federal criminal actions run the gamut of serious violations of the federal criminal laws.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

FREQUENTLY AS AN ATTORNEY IN PRIVATE PRACTICE AND AS AN ASSISTANT U.S. ATTORNEY. MY APPEARANCES IN COURT ARE SOMEWHAT LESS FREQUENT SINCE BECOMING UNITED STATES ATTORNEY.

2. What percentage of these appearances was in:

(a) federal courts;	70%
(b) state courts of record;	20%
(c) other courts *	10%

*INCLUDES QUASI-JUDICAL ADMINISTRATIVE HEARINGS, ARBITRATION PROCEEDINGS AND MILITARY COURTS MARTIAL.

3. What percentage of your litigation was:

a. civil	40%
b. criminal	60%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

APPROXIMATELY 70 CASES TRIED TO VERDICT OR JUDGMENT. I WAS SOLE OR CHIEF (LEAD) TRIAL COUNSEL IN ALL BUT ONE OF THESE CASES.

5. What percentage of these trials was:

(a) jury;	75%
(b) non-jury	25%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. UNITED STATES V. RICHARD W. MILLER,
USDC C.D. CAL NO. CR-84-972(A)-Kn

This was an espionage case. The defendant, an FBI agent, was charged with passing classified FBI documents to a Soviet KGB operative.

The first trial lasted 10 weeks (late 1986) and resulted in a hung jury, 11 to 1 for conviction. The re-trial lasted 14 weeks (Spring 1987) and resulted in guilty verdicts.

I was the lead prosecutor for the United States in both trials. Assistant U.S. Attorney Russell Hayman was my co-counsel. Mr. Hayman's phone number is (213)894-0636.

Miller was represented by Joel Levine and Stanley Greenberg. Their addresses and phone numbers are:

Joel Levine, Esq.
The Fine Arts Building
811 West Seventh Street -- 11th Floor
Los Angeles, CA 90017
Phone: (213)622-2635

Stanley Greenberg
10850 Wilshire Boulevard -- 4th Floor
Los Angeles, CA 90024
Phone: (213)474-6555 & (213)879-5800

U.S. District Judge David Kenyon presided at both trials.

2. ALEX CHOHON V. GARFIELD BANK
LASC No. ________________

This was an action by plaintiff for fraud and oral modification of promissory note. The bank cross-complained for judgment on the promissory note and to lift a stay on foreclosure proceedings against the security.

18. (CONTINUED)

I was lead counsel for defendant and cross-complainant bank. My co-counsel was Jeffrey Riffer, Esq., then an associate at Kadison, Pfaelzer, et al. Mr. Riffer's current address and phone number are:

Jeffrey Riffer, Esq.
Jeffer, Mangels & Butler
2121 Avenue of the Stars -- 10th Floor
Los Angeles, California 90067
Phone: (213)203-8080

Following a jury trial of approximately 4-5 weeks (1983), verdict was rendered for the defendant and cross-complainant bank. Judgment entered for the bank in the approximate sum of $1.3 million.

Plaintiff was represented by Paul Freese, a partner at Kindel & Anderson. Mr. Freese's address and phone number are:

Paul Freese, Esq.
Kindel & Anderson
555 S. Flower Street
Los Angeles, CA 90071
Phone: (213)680-2222

Judge Marnell of the Los Angeles County Superior Court presided at the trial.

3) UNITED STATES V. VSL CORPORATION, ET AL.
USDC S.D. FLA NO. ______________

This was a criminal, antitrust prosecution for alleged bid-rigging among several post-tensioning construction companies.

I was the lead counsel for defendant VSL Corporation. My co-counsel was Dale Pryweller. Mr. Pryweller's address and phone number are:

Dale Pryweller, Esq.
707 Wilshire Boulevard -- 40th Floor
Los Angeles, CA 90017
Phone: (213)559-7705

Following a two-week jury trial (circa 1981) in the U.S. District Court for the Southern District of Florida, the jury returned verdicts of not guilty as to VSL Corporation and the two individual co-defendants.

Jan Laurence Handzlik represented one of the individual defendants. Mr. Handzlik can be contacted at:

Jan L. Handzlik, Esq.
10920 Wilshire Boulevard -- Suite 3400
Los Angeles, CA
Phone: 213)687-5000

The other individual co-defendant was represented by a Miami, Florida law firm, name not recalled.

The government was represented by three attorneys from the Antitrust Division of the U.S. Department of Justice. They were:

Mr. Whitley
(Address Unknown)

Roderick Dormann
Dorman and Wheeler
725 S. Figueroa Street -- Suite 3305
Los Angeles, CA 90017
Phone: (213)488-1330

Kendra McNally
United States Attorney's Office
312 North Spring Street
Los Angeles, CA 90012
Phone: (213)894-6077

U.S. District Judge Clyde Claude Atkins of the Southern District of Florida presided over the trial.

18. (CONTINUED)

4) THOMAS P. GONZALEZ CORP. V. KAWASAKI KAISHA KISEN, LTD, aka "K" LINE
USDC C.D. CAL NO. CV __________ - LEW

Action by plaintiff for breach of contract. Defendant, a Japanese shipping line, failed to off-load a cargo of chili peppers at port of Encinada, Mexico, per ocean going bill of lading.

I represented plaintiff, an importer-exporter of agricultural commodities. Judgment for plaintiff for approximately $200,000.

The defendant, "K" Line, was represented by Thomas Vyse of Graham and James. Mr. Vyse can be contacted at:

Thomas Vyse
Deputy City Attorney
925 Harbor Plaza
Long Beach, CA 90802
Phone: (213)590-4117

U.S. District Judge Laughlin Waters presided over this court trial (circa 1979) of several days.

5) HERBERT HERRITT V. EQUITY FUNDING LIFE INSURANCE CO.
LASC NO.________________

This was an action by the beneficiary of a life insurance policy to recover the death benefit. Defendant insurance company (which had been acquired by Northern Life) claimed that a material misrepresentation in the insured's reinstatement application barred recovery.

18. (CONTINUED)

I was sole counsel for defendant life insurance company.

Following a three-day (circa 1978) court trial, judgment rendered for defendant.

Counsel for the plaintiff was Sydney Halem, current address unknown.

Los Angeles County Superior Court Judge Max Deutz was the trial judge. Judgment below was affirmed by the California Court of Appeal.

6) UNITED STATES V. HUGH MAC LEOD
PHEASTER AND ANGELO INCISO
USDC C.D. CAL. NO. ________________

This was a criminal prosecution for kidnapping of a 15-year old boy from Palm Springs, California and mailing of ransom demand notes (demanding $400,000 in ransom) to the boy's father, a wealthy industrialist.

I was the lead counsel for the United States. My co-counsel was Michael Kenney. Mr. Kenney can be contacted at:

Michael Kenney, Esq.
1615 North Broadway
Santa Ana, CA 92706
Phone: (714)953-0755

After a 3 to 4-week jury trial (1974), verdicts of guilty were returned against both defendants.

Defendant Pheaster was represented by John Van de Kamp, who can be contacted at:

18. (CONTINUED)

John Van de Kamp
Attorney General
State of California
3580 Wilshire Boulevard
Los Angeles, CA 90010
Phone (213)736-2273

Defendant Inciso was represented by Joseph Reichman, who can be contacted at:

Honorable Joseph Reichmann
U.S. Magistrate
U.S. Courthouse - Room G-13
312 North Spring Street
Los Angeles, CA 90012
Phone: (213)894-6911

U.S. District Judge Irving Hill presided over the trial.

Convictions affirmed on appeal at 544 F.2d 353 (9th Cir. 197_) Copy attached.

7) UNITED STATES V. JAMES DINSIO
AND RONALD BARBER
USDC C.D. CAL. NO. ____________

This was a bank burglary case. It involved the burglary of the United California Bank in Laguna Niguel, California. Over a weekend, the Dinsio gang of Youngstown, Ohio blasted their way into the bank's vault and stole approximately $5 million in cash, negotiable bonds and securities from the vault and safe deposit boxes, still one of the largest bank heists in the history of the U.S. The case was entirely based on circumstantial evidence.

I tried the case for the United States.

After a week and a half jury trial (circa 1973), both defendants were found guilty as charged.

18. (CONTINUED)

The attorney for the defendants were from New York City and Cleveland, Ohio. I do not recall their names.

The case was tried before U.S. District Judge Manuel Real.

Convictions affirmed on appeal at 495 F.2d 327 (9th Cir. 1974).

8) UNITED STATES V. SEYMOUR MATANKY, M.D.
USDC C.D. CAL. NO. __________

Dr. Matanky was charged with Medicare fraud, i.e., 47 counts of submission of false claims to the Social Security Administration for Medicare payments. After a three-week jury trial (circa 1972), Dr. Matanky was convicted of all counts of the indictment.

I prosecuted the case for the United States.

Dr. Matanky was represented by James Cantillon. Mr. Cantillon is deceased.

U.S. District Judge David W. Williams presided.

Conviction affirmed on appeal 482 F.2d 1319 (9th Cir. 1973)

9) UNITED STATES V. BRIAN CAREY, D.P.M.
USDC C.D. CAL. NO.__________

This was a Medicare fraud case against a podiatrist for falsely billing Medicare for toe surgery. After a two-week jury trial (circa 1971), defendant was found guilty on two counts. Jury hung on two counts.

I tried the case for the government.

18. (CONTINUED)

Dr. Carey was represented by John Davies, who can be contacted at:

Honorable John Davies
United States District Judge
United States Courthouse -- Room 1006
312 North Spring Street
Los Angeles, CA 90012
Phone: (213)894-2147

U.S. District Judge Charles H. Carr (deceased) presided.

Conviction affirmed at 475 F.2d 1019 (9th Cir. 1973).

10) UNITED STATES V. VERNON BROWN,
MICHAEL MC COWAN AND JOHN NEWBERRY
USDC C.D. CAL. NO. ___________

This case involved bribery of a court-appointed receiver, Vernon Brown. Defendant McCowan, an executive with a security guard service, was charged as the bribor. Defendant Newberry, a conduit for some of the bribe money, was charged with aiding and abetting the bribe scheme.

The trial of Vernon Brown was severed and trailed the trial of McCowan and Newberry.

I prosecuted both cases for the government. After a two-week jury trial (*circa* 1974), McCowan and Newberry were found guilty. After a separate two-week jury trial, Vernon Brown was found guilty.

McCowan was represented by Timothy Thornton, who can be contacted at:

Timothy Thornton, Esq.
Manatt, Phelps, Rothenberg & Phillips
11355 Olympic Boulevard
Los Angeles, CA 90064
Phone: (213)312-4000

18. (CONTINUED)

Newberry was represented by Louis Rimbach, who can be reached at:

Louis Rimbach, Esq.
Geffner & Saltsman
3055 Wilshire Boulevard -- Suite 900
Los Angeles, CA 90010
Phone: (213)487-1520 & (213)531-9724

Brown was represented by Kenneth Collins. Mr. Collins can be contacted at:

Kenneth L. Collins, Esq.
1930 Wilshire Boulevard -- Suite 206
Los Angeles, CA 90067
Phone: (213)413-0569

U.S. District Judge Albert Lee Stephens, Jr. presided over both trials.

Convictions affirmed by the Ninth Circuit.

19. Legal Activities: Describe the most significant legal activities you have pursued, incuding significant litigation which did not progress to trail or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

1. CAMARENA KIDNAP-MURDER PROSECUTION

This has involved my active participation as U.S. Attorney in the development of a case arising from the kidnapping, torture and murder of DEA Agent Enrique Camarena in Guadalajara, Mexico on or about February 9, 1985. In January 1988, my office returned an indictment against nine defendants, including Rafael Caro-Quintero, on charges of kidnapping and murder of a U.S. federal agent, and murder of Agent Camarena in order to enhance the defendants' positions in a narcotics enterprise. Three of the nine defendants named in our indictment are in U.S. custody and are pending trial in federal district court in Los Angeles.

19. (CONTINUED)

I have also consulted with representatives of the Mexican Government in an effort to secure their assistance in our prosecution and to see that justice is done respecting those responsible for the kidnap-murder of Agent Camarena by those who are in Mexican custody.

2. DEFENSE INDUSTRY KICKBACKS (OPERATION "DEFCON")

Since becoming U.S. Attorney in Los Angeles in 1984, I have overseen and coordinated a series of prosecutions involving the payment of sizable kickbacks from subcontractors and vendors on defense contracts to employees of prime contractors in Southern California. There have been over 60 convictions to date by my office for violations of the Anti-Kickback and related statutes. Most of the prosecutions have resulted in guilty pleas.

3. MORIARTY CORRUPTION CASES

This was a series of inter-related cases involving the corrupt payments by Wallace Patrick Moriarty, a wealthy fireworks and real estate magnate, to state and local politicians. Ultimately, after a two-year investigation, my office convicted Moriarty and his chief lieutenants on corruption and mail fraud charges. Five city councilmen and a California state legislator were convicted in connection with their receipt of corrupt payments. The Moriarty cases represented one of the most significant political corruption cases in recent California history.

4. CIVIL ANTITRUST SUITS/POST-TENSIONING INDUSTRY

While in private practice, I represented and defended a post-tensioning contracting company in four inter-related class action suits alleging violations of Section 1 of the Sherman Act. These suits, which related to different geographic marketing areas, were filed in the U.S. District Courts for the Eastern District of Pennsylvania, the District of Colorado, the Central District of California, and the Los Angeles County Superior Court. After considerable motion practice relating to class certification and other issues, I settled each of these actions on terms favorable to my client.

19. (CONTINUED)

5. MEAT INDUSTRY BRIBERY CASES

As an Assistant U.S. Attorney in Los Angeles, I developed and prosecuted a series of cases involving bribery by executives of meat packing companies of U.S. Department of Agriculture meat graders and inspectors. Typically, the bribes consisted of payments of $1,200 cash per month. Over a three-year period, over 70 defendants were convicted, including nearly all 30 Department of Agriculture meat graders assigned to the Los Angeles area.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   PURSUANT TO THE PARTNERSHIP AGREEMENT, MY WITHDRAWAL AGREEMENT AS A PARTNER FROM KADISON, PFAELZER, WOODARD, QUINN & ROSSI IN FEBRUARY 1984 PROVIDED FOR A FIXED TERMINATION BENEFIT PAYABLE MONTHLY FOR 120 MONTHS. THE FIRM DISSOLVED IN JULY 1987 AND PAYMENTS CEASED AT THAT TIME. I HAVE FILED A CLAIM WITH THE RECEIVER FOR THE PARTNERSHIP.

2. Explain how you will resolve any potential conflict of interest, including ~~the~~ procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangement that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I WOULD RECUSE MYSELF FROM ANY CRIMINAL OR CIVIL MATTER WHICH AROSE DURING MY TENURE AS UNITED STATES ATTORNEY FOR THE CENTRAL DISTRICT OF CALIFORNIA.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   NO.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   FINANCIAL DISCLOSURE REPORT IS ATTACHED.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

   SEE ATTACHED NET WORTH STATEMENT.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

(CONTINUED)

6. Have you ever held a position or played a role in a political campaign?

   NO.

   If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   NOT APPLICABLE.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   OVER ONE-HALF OF MY LEGAL CAREER HAS BEEN DEVOTED TO PUBLIC SERVICE WHERE I HAVE BEEN PROHIBITED FROM RENDERING OUTSIDE LEGAL SERVICES ON A PRO BONO OR ANY OTHER BASIS. WHILE IN PRIVATE PRACTICE, I ENGAGED IN SEVERAL PRO BONO ACTIVITIES. FOR EXAMPLE, I REPRESENTED WITHOUT FEE A GOVERNMENT EMPLOYEE, WHO COULD NOT AFFORD AN ATTORNEY, IN CONNECTION WITH ADMINISTRATIVE HEARINGS AS TO WHETHER HE SHOULD BE TERMINATED. THIS INCLUDED REPRESENTING THE EMPLOYEE AT A HEARING BEFORE THE CIVIL SERVICE COMMISSION. BECAUSE OF COURT BACKLOG, I ALSO CONTRIBUTED MY SERVICES TO THE LOS ANGELES MUNICIPAL COURT BY SERVING AS A JUDGE PRO TEM. IN ADDITION, I HAVE SERVED ON SEVERAL BAR ASSOCIATION COMMITTEES, E.G., THE FEDERAL BAR ASSOCIATION'S COMMITTEE TO HELP RECRUIT, SELECT AND INTERVIEW ATTORNEYS TO SERVE ON THE FEDERAL INDIGENT DEFENSE PANEL, AND OTHER CIVIC COMMITTEES, LIKE THE INTER-AGENCY COUNCIL ON CHILD ABUSE AND NEGLECT.

2. The American Bar Asosciation's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies?

   NO. I WAS GIVEN HONORARY MEMBERSHIP IN THE LOS ANGELES ROTARY CLUB AFTER MAKING A SPEECH THERE IN SPRING 1988. MY UNDERSTANDING IS THAT THE L.A. ROTARY DOES NOT ENGAGE IN INVIDIOUS DISCRIMINATION. FROM APPROXIMATELY 1978 UNTIL THE SPRING OF 1984, I WAS A MEMBER OF THE UNIVERSITY CLUB OF LOS ANGELES. IT IS MY UNDERSTANDING THAT THE UNIVERSITY CLUB DOES NOT AND DID NOT ENGAGE IN INVIDIOUS DISCRIMINATION.

III. GENERAL (PUBLIC)

2. (CONTINUED)

If so, list, with dates of membership. What you have done to try to change these policies?

NOT APPLICABLE.

3. Is there a selection commission in your jurisdiction to recommend canddidates for nomination to the federal courts?

YES.

If so, did it recommend your nomination?

YES.

Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

AROUND 1987, SENATOR PETE WILSON'S JUDICIAL SCREENING COMMITTEE RECOMMENDED ME FOR A UNITED STATES DISTRICT JUDGESHIP.

IN EARLY MARCH 1988, A MEMBER OF SENATOR WILSON'S STAFF INFORMED ME THAT THE SENATOR INTENDED TO SUBMIT MY NAME TO FILL AN ANTICIPATED VACANCY ON THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. ON MARCH 22, 1988, I WAS INTERVIEWED BY FOUR DEPARTMENT OF JUSTICE ATTORNEYS, TO WIT: ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL POLICY, STEPHEN J. MARKMAN; SETH LEIBMAN, ATTORNEY ADVISOR, OFFICE OF LEGAL POLICY; RAYMOND LEIDWISZEWSKI, ASSOCIATE DEPUTY ATTORNEY GENERAL, OFFICE OF THE DEPUTY ATTORNEY GENERAL (MR. LEIDWISZEWSKI IS NO LONGER AT THE DEPARTMENT OF JUSTICE) AND STEVEN VALENTINE, COUNSELOR TO ASSISTANT ATTORNEY GENERAL AND CHIEF OF STAFF FOR CIVIL DIVISION.

LASTLY, I WAS INTERVIEWED BY FBI SPECIAL AGENT HENRY WILLIAMS ON MAY 3, 1988.

III. GENERAL (PUBLIC)

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question?

   NO, EXCEPT THAT I WAS ASKED ABOUT MY GENERAL VIEWS CONCERNING MY JUDICIAL PHILOSOPHY DURING MY JUSTICE DEPARTMENT INTERVIEWS. NO ASSURANCES WERE SOUGHT.

   If so, please explain fully.

5. Please discuss your views on the following criticism involving "judicial activism."

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

   Some of the characteristics of this "judicial activism" have been said to include:

   a. A tendency by the judiciary toward problem-solution rather than grievance-resolution.

   b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

   c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

   d. A tendency by the judiciary toward loosening jurisdictional requirement such as standing and ripeness; and

III. GENERAL (PUBLIC)

5. (CONTINUED)

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

IN GENERAL, MY VIEW IS THAT THE ROLE OF THE FEDERAL COURTS IS NOT TO MAKE LAW, BUT RATHER TO APPLY THE LAW AS CONGRESS HAS ENACTED IT. OCCASIONALLY, IT IS NECESSARY FOR A DISTRICT JUDGE TO INTERPRET A STATUTE, AND OCCASIONALLY EVEN THE CONSTITUTION, AS A MATTER OF FIRST IMPRESSION. THE PERSONAL PHILOSOPHICAL OR IDEOLOGICAL BELIEFS OF A DISTRICT JUDGE SHOULD PLAY NO PART IN THIS. RATHER, IN THE ABSENCE OF BINDING CASE LAW, THE ROLE OF THE DISTRICT COURT IN INTERPRETING A STATUTE IS TO DIVINE THE INTENT OF CONGRESS BASED ON AN EXAMINATION OF THE APPLICABLE LEGISLATIVE HISTORY, WHERE THE STATUTE IS NOT CLEAR ON ITS FACE. IN THE AREA OF CONSTITUTIONAL INTERPRETATION, FREQUENTLY THERE WILL BE GUIDANCE FROM THE SUPREME COURT OR THE CIRCUIT COURT.

FAR REACHING ORDERS BY DISTRICT COURTS THAT GO BEYOND THE PARTIES AND THE ISSUES RAISED BY THE CASE ARE IMPROPER. IN AN APPROPRIATELY CERTIFIED CLASS-ACTION SUIT, ORDERS MAY EXTEND, OF NECESSITY, TO A BROAD CLASS OF INDIVIDUALS. NATURALLY, ORDERS OR OTHER EQUITABLE RELIEF SHOULD NOT EXTEND BEYOND THE DEFENDANTS NAMED AND PROPERLY BEFORE THE COURT.

AO-10
Rev. 8/87

FINANCIAL DISCLOSURE REPORT

Annual Report Due by May 15 from Judicial Officers and certain Judicial Employees (28 USCA App. I, §§ 301-09)

Person Reporting (Last name, first, middle initial) BONNER, ROBERT C.	Court or Organization U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA	Date of Report 6/15/88
Title (NOMINATED TO BE) UNITED STATES DISTRICT JUDGE	Date of Entry/Nomination/Termination (only if initial or final report) June 15, 1988	Reporting Period (Calendar year, or inclusive dates) 1/1/87 to 5/31/88
Home or office address 1269 U.S. COURTHOUSE 312 NORTH SPRING STREET LOS ANGELES, CALIFORNIA 90012		

IMPORTANT NOTES: *Please read the instructions accompanying this form. The report should include information pertaining to your spouse and dependent children, if any. Attach additional sheets if needed, identifying each attachment by showing your name, the date of the report, and the section(s) being completed.* Complete all sections, checking the NONE box for each section where you have no reportable information. *Compare and reconcile this report with last year's and list items in the same order as last year. Type or print clearly. Sign on last page.*

I. POSITIONS. *(Reporting individual only; see pp. 15-16 of Instructions.)*

☐ NONE (No reportable positions)

POSITION	NAME OF ORGANIZATION/ENTITY
UNITED STATES ATTORNEY CENTRAL DISTRICT OF CALIFORNIA	U.S. DEPARTMENT OF JUSTICE

II. AGREEMENTS. *(Reporting individual only; see p. 17 of Instructions.)*

☐ NONE (No reportable agreements)

DATE	PARTIES AND TERMS
2/14/84	WITHDRAWAL AGREEMENT FROM KADISON, PFAELZER PROVIDES FOR FIXED, LUMP SUM TERMINATION BENEFIT PAYABLE IN EQUAL MONTHLY INSTALLMENT OVER 120 MONTHS. THE LAW FIRM DISSOLVED IN JULY 1987 AND PAYMENT CEASED. I HAVE FILED A CLAIM WITH THE RECEIVER FOR THE FIRM.
CIRCA 1/1/78	KADISON PFAELZER HR-10 PLAN. I STILL HAVE FUNDS IN THIS PLAN, BU NO CONTRIBUTIONS HAVE BEEN MADE SINCE MY WITHDRAWAL AS A PARTNER FROM THE FIRM IN 2/

III. NON-INVESTMENT INCOME. *(Partial disclosure for spouse; see pp. 18-20 of Instructions.)*

☐ NONE (No reportable non-investment income)

	DATE (Honoraria only)	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1		U.S. DEPARTMENT OF JUSTICE SALARY	$110,000
2		KADISON,PFAELZER TERMINATION BENEFIT	$ 7,136
3			$
4			$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
BONNER, ROBERT C.	6/15/88

IV. REIMBURSEMENTS and GIFTS--transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

SOURCE	DESCRIPTION
☒ NONE (No such reportable reimbursements or gifts)	Not required to report
1	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. *(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)*

SOURCE	DESCRIPTION	VALUE
☒ NONE (No such reportable gifts)		
1		$
2		$
3		$
4		$

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 22-24 of Instructions.)*

CREDITOR	DESCRIPTION	VALUE CODE*
☒ NONE (No reportable liabilities)		
1		
2		
3		
4		
5		
6		
7		

* VALUE CODES J = $0 to $1,000 K = $1,001 to $5,000 L = $5,001 to $15,000 M = $15,001 to $50,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
BONNER, ROBERT C.

Date of Report
6/15/88

VII. INVESTMENTS and TRUSTS--income, value, transactions. *(Includes those of spouse; partial disclosure for dependent children; see pp. 24-35 of Instructions.)*

A. Description of Assets (including trust assets)	B. Income during period		C. Gross value at end of period		D. Transactions during period (Reporting individual and spouse)				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure.	Amt. Code[1] (A-H)	Type (e.g., div.)	Value Code[2] (J-P)	Value Method Code[3] (Q-W)	Type (e.g., sold)	Date Month-Day	Value Code[2] (J-P)	Gain Code[1] (A-H)	Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1 AMOCO (Common Stock)	B	DIV.	F	T					
2 KANSAS POWER & LIGHT (Common Stock)	B	DIV.	C	T					
3 MOBIL (Common Stock)	B	DIV.	D	T					
4 SANTA FE SOUTHERN PACIF. (Common Stock)	E	DIV.	D	T					
5 KANSAS GAS & ELECTRIC (Common Stock)	B	DIV.	C	T					
6 HOME SAVINGS & LOAN (LA) (Savings Accounts) (S)	B	INT.	F	T					
7 GREAT AMERICAN SAVINGS & LOAN (LA) (CDs)	C	INT.	F	T					
8 SHARES IN MERRILL LYNCH FEDERAL SECURITIES (J)	F	DIV. & CAP.GN	H	T					
9 KADISON, PFAELZER HR-10 PLAN	D	DIV. & INT.	H	T					
10 FEDERAL EMPLOYEES PENSION PLAN	B	INT.	D	T					
11 U.S. GOVERNMENT TIGR - ZERO COUPON BOND (DC)	B	APPRECIATION	D	T					
12 BANK OF AMERICA - ZERO COUPON BOND (DC)	B	APPRECIATION	E	T					
13 IBM CREDIT CORPORATION - ZERO COUPON BOND (DC)	B	APPRECIATION	E	T					
14 BARCLAY'S AMERICAN CORP. ZERO COUPON BOND (DC)	B	INT.	E	T					
15									
16									
17									
18									
19									
20									

1 Income/Gain Codes: A = exempt ($0 to $100) B = $101 to $1,000 C = $1,001 to $2,500 D = $2,501 to $5,000
G = $50,001 to $100,000 H = over $100,000

FINANCIAL DISCLOSURE REPORT (cont'd)	Name of Person Reporting	Date of Report
	BONNER, ROBERT C.	6/15/88

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. *(Indicate section of Report.)*

☐ **Check to affirm that differences in investments from those reported in prior year are exempt from disclosure.**

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

Signature Robert C. Bonner

Date June 15, 1988

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (28 U.S.C.A. APP. I, § 304, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

1. *Mail signed original and 4 additional copies to:*

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

[illegible] *the Clerk of the Court on which you sit or serve. (Judicial employees not*

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS	
Cash on hand and in banks	30,000--
U.S. Government securities—add schedule	NONE
Listed securities—add schedule 1	28,070
Unlisted securities—add schedule	NONE
Accounts and notes receivable:	
Due from relatives and friends	NONE
Due from others	NONE
Doubtful	68,000 (EST.*)
Real estate owned—add schedule 2	680,000
Real estate mortgages receivable	NONE
Autos and other personal property	30,000
Cash value—life insurance	3,000
Other assets—itemize:	
MERRILL LYNCH FED. SEC.	160,000
HR-10 PLAN	98,000
IRA ACCOUNT	25,000
Total assets	1,122,070

LIABILITIES	
Notes payable to banks—secured	NONE
Notes payable to banks—unsecured	NONE
Notes payable to relatives	NONE
Notes payable to others	NONE
Accounts and bills due	2,000
Unpaid income tax	NONE
Other unpaid tax and interest	NONE
Real estate mortgages payable—add schedule 2	104,000
Chattel mortgages and other liens payable	NONE
Other debts—itemize:	NONE
Total liabilities	106,000
Net worth	1,016,070
Total liabilities and net worth	1,122,070

CONTINGENT LIABILITIES	NONE
As endorser, comaker or guarantor	NONE
On leases or contracts	NONE
Legal Claims	NONE
Provision for Federal Income Tax	NONE
Other special debt	NONE

GENERAL INFORMATION	NO
Are any assets pledged? (Add schedule.)	YES**
Are you defendant in any suits or legal actions?	NO
Have you ever taken bankruptcy?	

1/ See Schedule No. 1, attached.

2/ See Schedule No. 2, attached.

* February 1984 -- Withdrawal agreement from former law firm provided for a fixed termination benefit of approximately $1,200 per month, payable for 120 months. Law firm dissolved in July 1987 and payments stopped. I have filed a claim with the receiver for the law firm.

** There may be a few pending civil suits arising from my duties as U.S. Attorney. These suits are frivolous. In any event, as a precautionary measure, I carry $1,000,000 in professional liability insurance.

SCHEDULE OF SECURITIES

LISTED STOCKS

	COMPANY	NO. OF SHARES	MARKET VALUE AT 5/20/88
1.	STANDARD OIL OF INDIANA	200	$15,000 (AT $75/SHARE)
2.	MOBIL OIL CORP.	96	$4,320 (AT $45/SHARE)
3.	SANTA FE SOUTHERN PACIFIC CORP.	230	$3,450 (AT $15/SHARE)
4.	KANSAS POWER & LIGHT	100	$2,400 (AT $24/SHARE)
5.	KANSAS GAS & ELECTRIC	100	$1,900 (AT $19/SHARE)
		SUBTOTAL:	$27,070

BONDS

1.	KANSAS TURNPIKE AUTHORITY		$ 1,000
		SUBTOTAL:	$28,070

SCHEDULE NO. 1

SCHEDULE REGARDING REAL ESTATE OWNED AND REAL ESTATE MORTGAGE PAYABLE

OWNED	CURRENT MARKET VALUE (EST.)
RESIDENCE AT 595 COVINGTON PLACE	$680,00 (PURCHASED IN MAY 1977 FOR $192,500)

MORTGAGES	PRINCIPAL AMOUNT
HOME SAVINGS & LOAN	$104,000

SCHEDULE NO. 2

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full Name (include any former names used).

Melinda Furche Harmon (maiden name was Melinda Sue Furche, used before 1977).

2. Address: List current place of residence and office address(es).

Office: 280th District Court, 301 Fannin Street, Room 309, Houston, Texas 77002. (713) 221-5539.

Residence: 6207 San Felipe, Houston, Texas 77057.

3. Date and place of birth.

November 1, 1946, Port Arthur, Texas.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Married to Francis G. (Frank) Harmon III, a partner at Crain, Caton & James, 3300 Two Houston Center, 909 Fannin, Houston, Texas 77010.

5. Education: List each college and law school you have attended, including dates of attendance and degrees received, and dates degrees were granted.

(a) College -

Radcliffe College of Harvard University 1969 AB degree.

(b) Law School -

University of Texas Law School, December, 1972, J.D. Degree.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Spring and Summer, 1970, Manpower of Galveston, Texas (I worked for American National Insurance Company as a temporary secretary) and Manpower of New York (I worked as a temporary secretary for the Borough of Manhattan Community College).

February, 1973 until July, 1975, Law Clerk for Honorable John V. Singleton, Jr., Federal District Judge, Southern District of Texas, Houston Division.

July, 1975 until January, 1988, attorney, Exxon Company, U.S.A., a division of Exxon Corporation, Houston, Texas.

January, 1988 to the present, Judge of the 280th Judicial District Court, Harris County, Texas.

7. Military Service: Have you had any military service? If so, give particulars, including dates, branch of service, rank or rate, serial number and type of discharge received.

No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

None

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association, Litigation Section
Texas Bar Association, Litigation Section
Houston Bar Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I belong to no lobbying organizations. Other organizations:

St. Anne's Catholic Church

Houston Professional Women's Republican Club

Texas Circle R

Harvard and Radcliffe Clubs of Houston (serve on Schools Committee interviewing potential Harvard students)

President's Council, Houston Grand Opera

Museum of Fine Arts, Houston

Museum of Natural Science, Houston

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States Supreme Court, March 29, 1982.
Fifth Circuit Court of Appeals, October 2, 1981.
Eleventh Circuit Court of Appeals, October 1, 1981.
Court of Claims, January 29, 1987.
Southern District of Texas, July 24, 1974.
Eastern District of Texas, February 3, 1978.
Northern District of Texas, July 8, 1975.
State Bar of Texas, April 16, 1973.

Some admissions may be recorded under the name "Melinda Sue Furche."

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have not been published, nor have I given speeches of the kind described.

13. Health: What is the present state of your health? List the date of your last physical examination.

The present state of my health is excellent. My last physical exam was in February of 1988.

14. Judicial Office: State (chronologically) any judicial office you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

> Since January 4, 1988 I have been the Judge of the 280th Judicial District Court. This is a Texas State trial court of general jurisdiction, handling civil matters.
>
> The office is elective, but I was appointed by the Governor of Texas to fill the unexpired term of Thomas R. Phillips, who had resigned to become Chief Justice of the Texas Supreme Court.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions were not officially reported, please provide copies of the opinions.

> (1) Texas State trial judges rarely write opinions and if they do, they are not reported. I have written no significant opinions.
>
> (2) I have been reversed in one case, Hellenic Investments, Inc. v. The Kroger Co., No. 01-88-00349 CV in the Court of Appeals for the First District of Texas. I had granted a temporary injunction prohibiting the operation of a nightclub in a shopping center in a violation of a lease. The Court of Appeals found that the temporary injunction was not specific enough to be enforced in that it did not define the term "nightclub." I have not been affirmed with significant criticism.
>
> (3) See answer to (1) above.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have held no public office other than the judicial office I now hold which is described above. In 1986 I was the unsuccessful Republican candidate for the 189th Judicial District Court, a court of identical general jurisdiction to the 280th District Court described above.

17. Legal Career:

(a) Describe chronologically your law practice and experience after your graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.

2. whether you practiced alone, and if so, the addresses and the dates.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

I served as a law clerk to Federal District Judge John V. Singleton, Jr., Southern District of Texas, Houston Division, from February, 1973 to May, 1975.

On July 1, 1975, I began working for Exxon Company, U.S.A., a division of Exxon Corporation, P.O. Box 2180, Houston, Texas 77001, in the Litigation Section of its Law Department where I remained until I took office January 5, 1988 as Judge of the 280th Judicial District Court of Harris County, Texas.

b. 1. What has been the general character of your practice, dividing it into periods with dates if its character changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you specialized.

My work for Exxon was a varied litigation practice. I began by assisting other, more senior, attorneys in writing memoranda and briefs, and investigating lawsuits. Gradually I was assigned to do more and more until 1977 when I was designated a "trial attorney" and given my own docket of small cases. In 1981 I was promoted to "counsel," then the equivalent of becoming a partner in a law firm. Shortly thereafter, I was given a docket of larger, more complicated cases which were those upon which I was working when I left Exxon to take the bench. At Exxon my practice consisted, inter alia, of personal injury, workers compensation, oil and gas, and contract, EEOC, PMPA, real estate, and environmental suits.

My clients at Exxon were the divisions, departments, subsidiaries, and affiliates of Exxon Corporation, with their varied litigation matters. I do not believe I specialized, but, rather, I concentrated in general contract litigation.

C. 1. Did you appear in court regularly, occasionally or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Until 1983 my court appearances were fairly regular. Since that time court appearances were occasional.

2. What percentage of these appearances was in

a) Federal courts. 50%
b) State courts of record. 50%
c) Other courts. 0%

3. What percentage of your litigation was

a) Civil. 100%
b) Criminal. 0%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

15 cases tried

Sole counsel 7
Chief counsel 5
Associate counsel 3

5. What percentage of these trials were

a) Jury. 40%
b) Non-Jury. 60%

18. Litigation. Describe ten of the most significant litigated matters which you personally handled. Give the citations, if the cases were reported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation, and the final disposition of the case.

Also state as to each case:

a) the date of representation;

b) the name of the court and the name of the judge before whom the case was litigated; and

c) the individual names, addresses and telephone numbers of co-counsel and of principal counsel for each of the other parties.

First Case

a. Style, number, court and date:

Parachute Joint Venture v. Exxon, No. 82-1319 (D. Colorado 1983, aff'd), No. 83-1790 (10th Cir. 1984).

Dated: Case filed 1982, tried 1983, affirmed, 1984

Courts and Judges: U.S. District Court, District of Colorado, Honorable Sherman Finesilver, District Judge; U.S. Court of Appeals for the 10th Circuit, Barrett, Doyle, and McKay, Justices.

b. Brief summary and importance of the case:

Summary and significance: Multi-million dollar Colorado contract, misrepresentation, and fraud case brought by two land investors against Exxon for damages allegedly sustained as a result of the shut-down of the Colony Shale Oil project in Western Colorado. The case was significant because of the large dollar amount sought and because of the serious allegations made against my clients. It was a risky case to try because at that time feelings against Exxon were extremely high.

Party represented: Exxon Corporation

Nature of participation: I was lead counsel in the case, handled all the pretrial discovery, supervised the pretrial investigation, and briefing, and sat first chair in the trial to the jury with Colorado co-counsel. I supervised the response to the plaintiff's appeal in the 10th Circuit, which was handled by Colorado co-counsel. The case was won before a jury in Denver, Colorado, and affirmed on appeal in an unpublished opinion.

c. Name, address and telephone number of counsel:

Opposing counsel: Philip Harley, 717 Seventeenth Street, Denver, Colorado 80202, (303) 571-9220; Jonathan Cox, 1775 Sherman, Denver, Colorado; (303) 839-9191.

Co-counsel: William McClearen and Scott Barker, Holland and Hart, Anaconda Tower, Denver, Colorado, (303) 295-8000.

Second Case

a. Style, number, court and date:

Kostantas v. Exxon, 663 F.2d 605 (5th Cir. 1981).

Dates: Case filed and disposed of at the District Court level, 1980, affirmed by the Fifth Circuit, 1981.

Courts and Judges: U.S. District Court, Southern District of Texas, Galveston Division, G-80-139, Hugh Gibson, District Judge. U.S. District Court of Appeals for the Fifth Circuit, (Justices Gee, Rubin, and Spears.)

b. Brief summary and importance of the case:

Summary and significance: A Petroleum Marketing Practices Act case in which a widow alleged a violation of the Act for failure to notify her deceased husband of his franchise termination. The significance of the case is that it established that the Act was not meant to be operative in a situation in which termination of the franchise was automatic upon death.

Party represented: Exxon Corporation

Nature of participation: I handled the case in its entirety: the filing and briefing of the 12 (b)(6) motion, argument on that motion, writing of the appellate brief, argument of the appeal before the 5th Circuit, and opposing the petition for certiorari. The 12 (b)(6) motion was granted; the Fifth Circuit affirmed, and certiorari was denied.

c. Name, address and telephone number of counsel:

Opposing counsel: Alton C. Todd, 418 First National Bank Building, Alvin, Texas 77511-2599; (713) 331-4441.

Third Case

a. Style, number, court and date.

Exxon v. Marvin D. Dunn, 581 S.W.2d 500 (Tex. Civ. App.-- Dallas 1979, no writ).

Dated: Case filed 1977, tried 1978, closed 1979.

Courts and Judges: County Court at Law No. 1, Dallas County, Texas, Honorable B. F. Coker, Judge. Texas Court of Civil Appeals, Dallas, opinion written by T. Z. Robertson, Associate Justice.

b. Brief summary and importance of the case.

Summary and significance: A Deceptive Trade Practices Act case alleging the failure to repair the air conditioning on an automobile. Repair was gratis, and the significance of the case is that it established that under the DTPA there must be some form of consideration before the Act applies. This was a case of first impression on a point of major significance to businesses, including Exxon, that operate in Texas.

. Party represented: Exxon Company, U.S.A.

Nature of participation: I handled the case in its entirety: I tried it, wrote the appellate brief, and argued it to the Court of Civil Appeals. The case was lost at the trial level, but won at the appellate level.

c. Name, address and telephone number of counsel.

Opposing counsel: Thomas C. Railsback, 705 Ross Avenue, Dallas, Texas 75202; (214) 748-9211.

Fourth Case

a. Style, number, court and date.

EEOC & Cook v. Exxon Shipping Co., 583 F. Supp. 632 (S.D. Tex. 1984) aff'd, 745 F.2d. 967 (5th Cir. 1984).

Dates: The case was filed in 1981, tried in 1983, affirmed in 1984.

Courts and Judges: U.S. District Court for the Southern District of Texas, Houston Division, Honorable John V. Singleton, Jr., District Judge. Fifth Circuit Court of Appeals, Justices Rubin, Randall, Tate.

b. Brief summary and importance of the case.

Summary and significance: An EEOC case in which the plaintiff alleged Exxon Shipping had failed to promote her from a secretarial position to a position as a "transportation allocator." The significance of the case is the interpretation of Ford Motor Co v. EEOC, 458 U.S. 219 (1982) that an unconditional offer of a comparable job tolled back pay.

Party represented: Exxon Shipping Company

Nature of participation: I was given the case a few weeks before trial, after the attorney who had been handling the case left Exxon's employ. I prepared the case for trial, tried it to the court, supervised the preparation of the appellate brief. I lost the case and that loss was affirmed by the Fifth Circuit.

c. Name, address and telephone number of counsel.

Opposing counsel: John Waley, Houston District Office, EEOC, 405 Main Street, Houston, Texas 77002; Gordon R. Cooper II, 4103 La Branch Street, Houston, Texas 77004; (713) 630-0030.

Co-counsel: J. Kevin French, Exxon Law Department, 800 Bell Avenue, Houston, Texas 77002; (713) 656-3636.

Fifth Case

a. Style, number, court and date.

Exxon Corp. v. Columbia Gas Transmission Co., 624 F. Supp. 610 (W.D. La. 1985).

Courts and Judges: U.S. District Court, Western District of Louisiana, Honorable John M. Duhe, District Judge.

Dates: Case filed 1984, Partial Summary Judgment granted in Exxon's favor, 1985; case settled, 1985.

b. Brief summary and importance of the case.

Summary and significance: Exxon brought suit on over seventy natural gas purchase contracts for specific performance, payment of contract price, and take-or-pay amounts. The case was significant because, after extensive briefing, a partial summary judgment was granted in Exxon's favor, requiring the pipeline to take whatever vintage of gas was delivered in the discretion of the purchaser and to pay the contract price for that gas. This was one of the first cases of this type to obtain a judgment on these hotly contested issues. After the partial summary judgment was granted, the case was settled on terms most favorable to Exxon.

Party represented: Exxon Corporation

Nature of participation: I was lead counsel of a joint effort, assisted by in-house Exxon attorneys and local Louisiana counsel. I participated in and supervised the massive discovery effort and the writing of the briefs for partial summary judgment which was done entirely by in-house Exxon attorneys. I argued the motion before the Court.

c. Name, address and telephone number of counsel.

Opposing counsel: Frank J. Peragine and Thomas R. Blum, 4300 One Shell Square, New Orleans, Louisiana 70130.

Co-counsel: H. H. Hillyer, Jr. and Hampton Carver, Milling, Benson Firm, 909 Poydras, New Orleans, Louisiana; (504) 650-7000; Stephen York, Exxon Law Department, Midland, Texas; (915) 699-5210.

Sixth Case

a. Style, number, court and date.

Exxon v. Katz, No. CIV. 81-6041, Superior Court for the State of Alaska, Third Judicial District.

Courts and Judges: Superior Court, State of Alaska, the Honorable Judge, Supreme Court of Alaska.

Dates: The case was filed in 1981; Summary Judgment granted in the Superior Court, the Honorable Dan A. Moore, Superior Judge, and overturned by the Supreme Court of Alaska, 1983.

b. Brief summary and importance of the case.

The suit challenged as not authorized by statute certain regulations of the Alaska Department of Natural Resources which require persons conducting geophysical or geological field exploration on Alaska state lands, pursuant to multiple land use permits, to furnish gratis to the state the technical information generated by those operations. The regulation was felt to be fundamentally unfair, inasmuch as the state is in direct competition with those obtaining the permits and the data, as well as unauthorized by the legislature which had the year before rejected a statute designed to accomplish the goal of the regulation. The trial court agreed with that position and granted a Summary Judgment. The Supreme Court of Alaska reversed, however, and declared the regulations valid. The case is significant because of the novel legal questions involved.

Party represented: Exxon Corporation

Nature of participation: I supervised the briefing in the case which was done largely in house at Exxon, and I argued Exxon's case before the Supreme Court of Alaska.

Name, address and telephone number of counsel:

Opposing Counsel: At the Superior Court level, the State's attorney was Michael Arruda; I do not know where he is presently located. At the Supreme Court level the State's attorney was Robert Maynard, Assistant Attorney General, State of Alaska, P.O. Box K. Juneau, Alaska; (907) 465-3600.

Co-Counsel: Kevin T. Haroff, then of Exxon's legal Department, now a lawyer at McCutchen, Doyle, Brown, and Enersen, Three Embarcadero Center, San Francisco, California 94111; (415) 393-2000; Carl J. D. Bauman, Hughes, Thorsness, Gantz, Powell, and Brundin, 509 West Third Avenue, Anchorage, Alaska 99501; (907) 274-7522.

Seventh Case

a. Style, number, court and date.

Secretary of the Interior v. California, 464 U.S. 312, 104 S.Ct. 656 (1984).

Courts and Judges: U.S. District Court, Central District of California, The Honorable Marianne Pfaelzer, District Judge; U.S. Court of Appeals for the Ninth Circuit, Justices Sneed, Tarig, and Pregerson; United States Supreme Court, opinion by Justice O'Conner.

Dates: Case filed 1981, Summary Judgment granted 1981, affirmed in part by the Ninth Circuit 1982, reversed by the Supreme Court 1983.

b. Brief Summary and importance of the case.

Two cases, later consolidated, were filed by the State of California and local California governments and by a number of environmental groups to enjoin Federal Lease Sale 53, a closed bid auction for the right to explore for oil and gas on the Outer-Continental shelf, offshore California. The plaintiffs challenged the sale on the grounds that the agency responsible for the Sale, the Department of the Interior, had not satisfied the California Coastal Zone Management Plan, adopted pursuant to the federal Coastal Zone Management Act. After extensive litigation in the lower courts, the U.S. Supreme Court found that the Coastal Zone Management Act does not apply to federal activities on the Outer-Continental Shelf. The case is significant because it conclusively determined the exclusive jurisdiction of the Department of the Interior over the Outer-Continental Shelf.

Party Represented: Exxon Corporation.

Nature of Participation: Exxon and a number of other oil companies interested in the lease sale process intervened in the case on the side of the Department of the Interior. I represented Exxon's interest in the latter stages of the case, after Exxon's original attorney left the company's employ. I worked closely with the lawyers from the other intervening oil companies on an ad hoc committee formed to handle the lawsuit. The lead attorney was E. E. Bruce, who was hired by the intervening companies to represent them in the case.

c. Name, address and telephone number of counsel.

There were many attorneys involved on the plaintiff, defendant, and intervenors' sides. I will list only the attorneys of whom I have a record.

Opposing counsel: Then California Attorney General George Duekmejian, assisted by N. Gregory Taylor, 3580 Wilshire Blvd., Los Angeles, California 90010. There were a host of other opposing counsel, but sonce I did not deal directly with them, I have no record.

Government counsel: Peter Steenland, U.S. Department of Justice, 10th and Pennsylvania Avenue, Washington, D.C. 20530; (202) 633-2748.

Intervenor counsel: E. E. Bruce, Covington & Burling, 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20044; (202) 662-5284; Howard J. Privett, 600 Wilshire Blvd., Los Angeles, California, (213) 624-2400 (local counsel).

Eighth Case

a. Style, number, court and date.

Amoco Production Co. v. Village of Gambrill, 107 S.Ct. 1396 (1987).

Courts and Judges: U.S. District Court, District of Alaska, Honorable James Von Der Heydt, Judge; Ninth Circuit Court of Appeals, Justices Browning, Hug, and Reed, Supreme Court of the United States.

Dates: The case was filed in 1983. The lease sale eventually went forward. After the Ninth Circuit decided the case on the merits and remanded to the lower court in 1984, the plaintiffs sought a temporary injunction preventing activities on the leases obtained in the sale. The District court denied the temporary injunction, but the Ninth Circuit reversed that decision in 1985. Certiorari was granted in 1986, and the Ninth Circuit reversed in 1987. The case is still pending.

b. Brief summary and importance of the case.

The case was brought by environmental groups and Alaskan native villages seeking to enjoin Federal Lease Sale 57 for oil and gas exploration on the Outer-Continental shelf, offshore Alaska. The plaintiffs challenged the Sale on the grounds that the Department of the Interior, the agency responsible for the lease sale, had failed to satisfy the notice and hearing requirements of the Alaska National Interest Land Conservation Act (ANILCA) before noticing the sale. The Sale itself was not enjoined, but after the Ninth Circuit determined that ANILCA did apply to federal activities on the Outer-Continental shelf, plaintiffs sought to enjoin activities on the leases. A temporary injunction was obtained in the Ninth court on the sole ground that the statute had been violated. The Supreme Court reversed the decision of the Ninth Circuit, holding first that ANILCA does not apply to federal activities on the Outer-Continental shelf and second, that the Ninth Circuit had applied an incorrect standard in ruling solely on the purported fact of violation of a federal statute to grant the injunction. The case was significant in delineating the reach of ANILCA and in reiterating the federal standards for injunctive relief.

Party represented: Exxon Company, U.S.A.

Nature of Participation: Exxon and a number of other oil companies interested in the Lease Sale process intervened in the case on the side of the Department of the Interior. I represented Exxon's interests throughout the case. I worked closely with the lawyers from the other intervening oil companies on an ad hoc committee formed to write the briefs and otherwise handle the lawsuit. I also chaired that ad hoc committee. The lead attorney was E. E. Bruce, who was hired by the intervening companies to represent them in the case.

c. Name, address and telephone number of counsel.

There were many attorneys involved on the plaintiff, defendant, and intervenors' sides. I will list only the attorneys of whom I have a record.

Opposing Counsel: Donald Cooper, Alaska Legal Services Corp., 615 H Street, Suite 100, Anchorage, Alaska 99501. I did not deal directly with opposing counsel

Government counsel: There were many government attorneys who were involved in this case throughout its history. The case was argued in the Supreme Court by Hank Habitch, Department of Justice, Washington, D.C.

Intervenors' counsel: E. E. Bruce, Covington & Burling, 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20044; (202) 662-5284; Carl J. D. Baumen, Hughes, Thorsness, Gantz, Powell & Bruedin, 509 W. Third Avenue, Anchorage, Alaska; (907) 274-7522.

Ninth Case

a. Style, number, court and date.

Exxon Corporation v. United State of America, No. 33-876 (Ct. Cl. 1987).

Dates: The case was filed in the Court of Claims on January 21, 1987. After a finding of no jurisdiction by the Interior Board of Land Appeals, the parties entered into a stipulation of judgment. The judgment was signed April 30, 1987.

Courts and Judges: United States Court of Claims, the Honorable Lawrence S. Margolis Judge; judgment signed by the Honorable Loren A. Smith.

b. Brief summary and importance of the case.

The case was brought by Exxon against the Department of the Interior and the Department of the Army for almost 10 million dollars on theories of failure of consideration and for inverse condemnation of several oil and gas leases in Fort Chaffee, Arkansas acquired by Exxon in a federal lease sale. A large portion, 5,875 acres out of 11,000 acres acquired, could not be explored or developed for oil and gas because it was unsafe, being located in a long used artillery range. Extensive negotiations and discovery were conducted before the case was filed. A claim was also filed in the Interior Board of Land Appeals (IBLA) and was rejected by that Board for lack of jurisdiction. Soon after the rejection of the IBLA the case was settled. The case's significance lies in the fact that the monetary amounts at stake were substantial and the and the issues novel.

Party represented: Exxon Corporation

Nature of participation: The case was handled entirely in-house with the assistance of Washington counsel only on a "local counsel" basis. I was the lawyer in charge of the case, with full responsibility. I was assisted by another Exxon attorney in carrying out this responsibility.

c. Name, address and telephone number of counsel.

Opposing counsel: James T. Draude, U.S. Department Of Justice, 10th and Pennsylvania Avenue, Washington, D.C. 20530.

Co-Counsel: Thomas Gannon, then in Exxon's legal department, now with Tower, Burne, and Beaugureau, Park One, 2111 East Highland Avenue, Suite 255, Phoenix, Arizona 85016; (602) 956-4438.

E. E. Bruce, Covington & Burlington, 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20044; (202) 662-6000.

Tenth Case

a. Style, number, court and date.

State of Alaska v. Amerada Hess, No. 1JU-77-847 Civil (First Judicial District court, Juneau, Alaska).

Courts and Judges: Superior Court, State of Alaska, Honorable Walter L. Carpenetti, Judge.

Dates: The case was filed in September, 1977, and it is still pending in the trial court.

b. Brief summary and importance of the case.

The suit was filed shortly after oil production began at Prudhoe Bay, Alaska by the state of Alaska which owns 100% of the one-eighth royalties in that field. The defendants are the several Prudhoe Bay producers, including Exxon Corporation. The State has alleged that the producers are not paying the amount of royalties actually due the State. The case is important because of the substantial sums sought by the State from the largest domestic oil and gas field and because of the unique oil and gas issues involved in the case.

Party represented: Exxon Company U.S.A., a division of Exxon Corporation.

Nature of participation: From 1983, I became involved with a team of lawyers and support personnel in the defense of Exxon's case and cooperation with counsel for other defendant oil companies in a joint defense effort. From approximately 1986 onward, I became in charge of that team, responsible for the extensive discovery effort and pretrial briefing and other preparation. At the time I left Exxon, I was spending approximately 65-85% of my time working on this case.

c. Name, address and telephone number of counsel.

Opposing counsel: Robert Maynard, Esq., Assistant Attorney General, State of Alaska, P.O. Box K, Juneau, Alaska 99811; (907) 465-3600; Wilson Condon, Hellen, Partnow & Condon, 510 L Street #500, Anchorage, Alaska 99501; (907) 276-2713; Spencer Hosie, 1 Market Plaza, San Francisco, California; (415) 764-4848.

There were other lawyers for the State, but these were the attorneys dealing with Exxon.

Co-counsel: John Held, Baker & Botts, 3300 One Shell Plaza, Houston, Texas; (713) 229-1201; Carl J. D. Bauman, Hughes, Thorsness, Gantz, Powell & Brundin, 509 W. Third Avenue, Anchorage, Alaska 99501; (907) 274-7522.

For Exxon U.S.A., 800 Bell Avenue, Houston, Texas 77002, Randall Ebner; (713) 656-6417; J. R. Stevens, Jr.; (713) 656-2164; Lynn Klafehn; (713) 656-5625; Grace Yeh; (713) 656-5962.

Co-counsel for other companies:

There are many other lawyers for the other companies, the following are those most heavily involved: James Murphy, Squire, Sanders & Dempsey, 1200 Pennsylvania Avenue, N.W., Washington, D.C.; (202) 626-6793; Howard Nichols, Squire, Sanders & Dempsey, 1800 Union Commerce Building, Cleveland, Ohio 44115, (216) 687-8743; Phillip Judson, Pillsbury, Madison & Sutro, 225 Bush Street, San Francisco, California 94104, (415) 983-1000; Richard Hahn, Standard Oil Company, 39-B-5300, 200 Public Square, Cleveland, Ohio, (216) 586-4567; Robert Jordan, Michael Kail, Darrell Chamblee, of Steptoe and Johnson, 1330 Connecticut Avenue NW, Washington, D.C. 20036, (202) 429-6200; William B. Rozell, Faulkner, Banfield, Doogan & Homes, 302 Gold Street, Juneau, Alaska 99801, (907) 586-2210.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question; please omit any information

protected by the attorney-client privilege (unless the privilege has been waived).

While I was an attorney at Exxon, my most significant legal activities were involved with representing that company in oil and gas-related litigation. The ten cases described above are probably the most significant activities which I have pursued in my career. Their significance is described along with each case. These cases were not, of course, the only cases on my docket, and I was involved in many more cases which were resolved before suit was filed, settled before being brought to trial, or disposed of on motion for summary judgment.

In many instances I would be brought in well before a decision was made on the filing of a lawsuit. For example, I was lead counsel in a contemplated challenge to the North Slope Borough's Zoning Ordinance. Many provisions of this ordinance involved a potential threat to oil and gas operations on the North Slope of Alaska. I was involved in the task force which Exxon assembled to analyze and comment on the Borough's proposed ordinance for many months before it was determined that suit would be filed. On two occasions, I travelled to Alaska to prepare a lawsuit to challenge the Borough's authority to regulate oil and gas activities on the Slope. In both instances, the suit was not filed because of a resolution of the disputes.

I was also involved in monitoring lawsuits in which Exxon had an interest. For example, in a case brought by an Alaskan native organization against ARCO and the Environmental Protection Agency challenging the permitting process for drilling offshore Alaska, after monitoring the case for several years, Exxon determined to intervene as party defendants. The case involved extensive briefing on substantive and procedural questions. After the case had gone to the Ninth Circuit, it was rendered moot, but issues concerning the awarding of attorneys' fees kept the case active for a number of years more. I worked closely with outside counsel on the case in chief; the briefing on the attorneys' fees issues was largely accomplished in-house.

One of the most rewarding activities in which I participated as an attorney for Exxon was in training newly-hired Exxon lawyers. I was, for most of my career, assigned each year or two a new attorney for whose professional training I was responsible. I was involved in supervising their activities, guiding their professional progress, and providing for them the opportunity to develop as attorneys. I took this part of my job very seriously and derived a great deal of satisfaction from it.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

> Other than future retirement benefits, which I will receive from Exxon Corporation due to my former employment with that company, I expect to derive no future benefits from any previous business relationships, professional services, firm memberships, former employers, clients, or customers.

2. Explain how you will resolve any potential conflict of interest, including, the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

> I will continue what I have done as a State District Judge, to recuse myself in any case involving my husband's law firm and any case involving as a party Exxon or one of its affiliates. I own a number of shares of Exxon stock both outright and through an IRA. Another IRA owns stock in other companies, and I keep informed of the stocks in that fund, and would recuse myself in any case involving as a party those companies. I have not had to do that at this point in my state court career.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

> I do not.

4. List sources and amounts of all income received during the calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by

the Ethics in Government Act of 1978, may be substituted here.)

A copy of the financial disclosure report is attached.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

Attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

> Beyond working as a campaign worker in putting labels on envelopes, making signs, and handing out literature for various state judicial candidates over the years, I have never held a position or played a role in a political campaign except my own. In 1986 I ran for Judge of the 189th Judicial District Court. As the candidate I was involved in all aspects of the county-wide campaign from putting on mailing labels to making speeches.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My pro bono experience has been primarily in areas of law outside of my usual legal practice, and therefore it has been particularly rewarding to me as a lawyer. Several examples are: In 1976 I wrote the will of an elderly lady who had worked all her life. She had one piece of real property which she wanted to leave to her daughter, but was otherwise disadvantaged. In 1986 she died and her son-in-law the Reverend Culverson Lee Punch, who had been named executor, asked me to file the will for probate and represent him in the probate hearing. I had never drafted a will or attended a probate hearing before but I learned how to do this as the family was unable to afford an attorney; In 1986 I performed two legal tasks for the Missionary Brothers of Charity, a branch of Mother Theresa's group which lives in strictest poverty and serves the poor. I examined the title of a piece of property which they were given, and I obtained their Non-Profit Corporation Charter from the State of Texas; I have also handled a divorce which included child custody arrangements.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that individually discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I have never belonged to any such group.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

I am not aware of a formal selection commission in my jurisdiction that recommends candidates for nomination to the federal courts. Senator Gramm has, however, established a committee which interviews potential candidates for the federal judiciary to aid him in his recommendation process.

I interviewed with that group, but I do not know whether or not I was recommended by the committee. I believe that I was recommended, since I was one of several persons who were interviewed by Senator Gramm. My experience in the judicial selection process began with my telephone call to Senator Gramm's office, asking for information about how I could be considered for an appointment to Judge Singleton's soon to be vacant bench. I was sent a questionnaire to complete.

I sent the completed questionnaire to Senator Gramm's office, and was later contacted by one of the members of his selection committee to arrange an interview. I interviewed with the committee and was later contacted by Senator Gramm's office to arrange an interview with him. I interviewed with Senator Gramm, and was recommended by him for nomination the next day. After Senator Gramm's recommendation, I interviewed with various persons in the Justice Department, the FBI, and with Lloyd Lochridge of the American Bar Association. I was, after that, contacted by President Reagan and nominated.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal Judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

> I developed my concept of the role of the Federal Judiciary within our society from United States District Judge John V. Singleton, Jr. of the Southern District of Texas, for whom I served as a law clerk for more than two years. That Court did not have the cast of "judicial activism" or "judicial restraint," but rather upheld the law as embodied by the Constitution, the rulings of superior courts, and the applicable laws of the United States and the individual states. The personal opinions or preferences of Judge Singleton, if ever at variance with those authorities, would never interfere with his duty to uphold the law.
>
> In my brief career as a state court judge, I have tried to follow Judge Singleton's example. I believe that the primary function of a trial court is to resolve a factual dispute and determine the applicable law, thereby resolving a conflict. There will be instances in which the resolution of these disputes may have a broader implication or affect a broader area of public policy or class of individuals than those before the court,

but that would only be the result of the recognition of the precedential value of the law as determined by the trial court in its underlying dispute resolution.

I do not believe the Federal Courts have the authority to serve a legislative or executive function. As a judge, in cases presented to me, I have refused to impose my personal views upon the disciplinary rules of a private school that were not at variance with state law, and I have refused to order the local executive committee of a political party to grant power beyond that mandated by state law to the local elected chairman.

In our system the state courts are the courts of general jurisdiction. Recognition of state court authority requires a federal court, which is of limited jurisdiction, to assure that specific Constitutional or statutory criteria have been met before its power may be invoked.

WILLIAM PELHAM BARR

Date of Birth:	May 23, 1950	New York, NY
Legal Residence:	Virginia	
Marital Status:	Married	Christine Mary Barr three children
Education:	1967 - 1971	Columbia College B.A. degree
	1971 - 1973	Columbia University M.A. degree
	1973 - 1977	George Washington Univ Law School J.D. degree
Bar:	1977	Virginia Bar
	1978	DC Bar
Experience:	1973 - 1977	Central Intelligence Agency Ofc of Legislative Counsel Intelligence Officer & Legislative Liaison
	1977 - 1978	Law Clerk to Hon Malcolm Wilkey, U.S. Court of Appeals, DC Circuit
	1978 - 1982	Shaw, Pittman, Potts & Trowbridge Associate
	1982 - 1983	Exec Ofc of the President Ofc of Policy Development Deputy Asst Director
	1983 - pres	Shaw, Pittman, Potts & Trowbridge Partner
Office:	2300 N Street NW Washington, DC 20037 202 673-2561, 663-8422	
Home:	6460 Spring Terrace Falls Church, VA 22042	

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full Name (including any former names used.)**

William Pelham Barr

2. **Address: List current place of residence and office address(es).**

home: 6460 Spring Terrace
Falls Church, Virginia 22042

office: Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

3. **Date and place of birth.**

May 23, 1950
New York, New York

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

spouse: Christine Moynihan Barr
spouse's occupation: Librarian (part-time)
employer: International Monetary Fund
Washington, D.C.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Columbia College 1967 - 1971
N.Y., N.Y. A.B. 1971

Columbia University 1971 - 1973
N.Y., N.Y. M.A. 1973
(Political Science/Chinese Studies)

National Law Center 1973 - 1977
George Washington University J.D. 1977
Washington, D.C.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1971 - 1972	Central Intelligence Agency Summer Intern Program
1973 - 1977	Central Intelligence Agency (1973 - 75 Intelligence Directorate) (1975 - 77 Office of Legislative Counsel)
1977 - 1978	Law Clerk to the Honorable Malcolm R. Wilkey U.S. Circuit Judge U.S. Court of Appeals for the D.C. Circuit
1978 - 1982	Shaw, Pittmam, Potts & Trowbridge Washington, D.C. (Law Firm - Associate)
1982 - 1983	Deputy Assistant Director Office of Policy Development White House
1983 - 1989	Shaw, Pittman, Potts & Trowbridge * 1983-84 Associate 1985-89 Partner
1984 - 1989	2300 N Street Associates real estate investment partnership with a number of other Shaw, Pittman partners

* In connection with law practice at Shaw, Pittman, when the firm was asked to set up a new corporation for a client, I would occasionally be listed as an incorporating director/officer for purposes of filing incorporation papers but would be replaced by the permanent director/officer at the first corporate meeting. In one case, however, I actually did serve on a client's board. In April 1986, Scottish Widows Fund Assurance Society, a U.K. insurance company, asked me to serve on the board of its two wholly-owned U.S. subsidiaries, "Dalkeith Corporation" and "1146 19th Street Corporation". These corporations own a commercial office building in Washington, D.C. I served as a director, vice president, and treasurer of each subsidiary from April 1986 to January 1989.

7. **Military Service**: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe should be of interest to the Committee.

NDFL Fellowship (Mandarin Chinese)

Order of the Coif

J.D. With Highest Honors

9. **Bar Associations**: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Virginia State Bar

District of Columbia Bar

American Bar Association

10. **Other Membership**: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

American Bar Association

Knights of Columbus

11. **Court Admission**: List all courts in which you have been admitted to practice, with dates of admission and lapse if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Virginia Supreme Court 1977 to present

District of Columbia Court of Appeals
1978 to present

U.S. District Court for the District of Columbia
1978 to present

U.S. Court of Appeals for the District of Columbia Circuit
1978 to present

U.S. Court of Appeals for the Federal Circuit
1988 to present

12. **Published Writings**: List the titles, publishers, and dates of books, articles, reports, or other published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. September 28, 1988 (complete physical)

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any successful candidacies for elected public office.

None, other than the government positions listed in no. 6 above.

15. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were clerk;
2. Whether you practiced alone, and if so, the address and dates;
3. The dates, names and addresses of law firms or offices, companies or government agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

2. **What percentage of these appearance was in:**
    - **(a) federal court**
    - **(b) states courts of record;**
    - **(c) other courts.**

3. **What percentage of your litigation was:**
    - **(a) civil;**
    - **(b) criminal.**

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

5. **What percentage of these trials was;**
    - **(a) jury;**
    - **(b) non-jury.**

I attended law school at night from September 1973 to June 1977, while I was working for the Central Intelligence Agency. From February 1975 forward, I served in the Agency's Office of Legislative Counsel. My principal duties were analyzing the impact of proposed legislation on Agency operations, drafting Agency bill comments, drafting Hill testimony, carrying on liaison with Congressional committee staffs, drafting Agency-proposed legislation, and coordinating legislative activities with other agencies and OMB.

In July 1977, I left the Agency to serve as law clerk to the Honorable Malcolm R. Wilkey, U.S. Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit. I completed my clerkship in September 1978.

In October 1978, I started as an associate with the Washington, D.C. law firm of Shaw, Pittman, Potts & Trowbridge. I was the 55th lawyer at the firm. I remained at the firm as an associate until May 1982.

During this period as a Shaw, Pittman associate, I functioned largely as a generalist, with about 70% of my time devoted to litigation and about 30% to other areas of the firm's practice. The firm's clients were mainly national or large local corporations. My responses to questions no. 16 and 17 below describe some of the matters upon which I worked.

The litigation -- all civil -- was varied, although a significant part of it involved environmental cases. Virtually every case I worked on was staffed by a total of two lawyers

-- one supervising partner and me. Although, in number, I handled more state court cases than federal, I devoted substantially more time to the federal cases because they tended to be more complex. Appearances in federal cases were infrequent and were generally handled by the supervising partner. I occasionally appeared in state court cases, usually to argue motions. Most of the cases upon which I worked either were settled or disposed of on motion.

One complex environmental case went to non-jury trial in federal district court. Atchinson, T.& S.F.Ry.Co. v. Alexander, 480 F.Supp. 980 (D.D.C. 1979). We represented defendant-intervenor and played a substantial role in the case. I assisted the partner who tried the case for our client. Judgment was for defendant and was upheld in all material respects on appeal. Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981). See my response to question no. 16 for further details.

An arbitration I handled went to a final award. Berlin v. Chevy Chase Lake Corp., 16 10 0071 81 (American Arbitration Association). The case involved valuation of a closely-held corporation. We represented the defendant. I assisted the supervising partner who tried the case. The final award was substantially below the amount sought by plaintiff.

Examples of some of the non-litigation matters I worked on during this period are provided in response to question no. 17 below.

In May 1982, I left Shaw, Pittman, Potts & Trowbridge to accept a position as Deputy Assistant Director for Legal Policy in the Office of Policy Development at the White House. My responsibilities included (1) preparing briefing papers for senior White House staff; (2) coordinating preparation of briefing papers and decision documents for the Cabinet Council on Legal Policy; (3) representing the White House on inter-agency working groups; and (4) reviewing agency bill comments and testimony in conjunction with the OMB process.

In September 1983, I left the White House and returned to Shaw, Pittman, Potts & Trowbridge. In October 1984, I was elected as a partner, effective January 1985. The firm currently has over 225 lawyers.

Since returning to Shaw, Pittman, the nature of my practice has been different than it was during my earlier period with the firm. In recent years I have spent less time on litigation and more on administrative/regulatory matters before federal agencies. For examples of these non-litigation projects see responses to question no. 17 below.

In the litigation area, while I have taken on fewer cases, I have now assumed lead responsibility on these matters. My court appearances have been more frequent, and have been either in federal court or in federal administrative tribunals. I have tried one case to verdict as co-counsel in a non-jury administrative trial. (See Murray v. Henry J. Kaiser Co. in response to question no. 16 below.)

16. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

- **(a) the date of representation;**
- **(b) the name of the court and the name of the judge or judges before whom the case was litigated; and**
- **(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.**

The following include cases that were decided on motion and some that were settled. On all the listed cases, except for no. 10, I was the sole associate, supervised by one partner. On no. 10, I am the supervising partner assisted by one associate.

1. **Atchinson, T.& S.F.Ry. Co. v. Alexander**, 480 F.Supp. 980 (D.D.C. 1979), aff'd in part, rev'd in part sub nom., Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981). (District Judge: Richey) (Circuit Judges: Wright, Robb, Penn).

Almost one-quarter of my time from October 1978 through July 1981 was devoted to defending against an action brought by 18 midwestern railroads and three environmental groups challenging, under NEPA and the APA, a Corps of Engineers' decision to construct an expanded replacement facility for Lock & Dam 26 on the Mississippi River. We represented the defendant-intervenor, Association for the Improvement of the Mississippi River ("AIMR"), an association of over 350 municipalities, businesses, farm and labor organizations, waterway carriers, and shippers that depend on waterway transportation. The case involved extremely complex technical and legal issues. Although the Corps was represented by DOJ, AIMR played a leading role in all aspects of the case. I was responsible for legal research; developing factual and expert evidence; discovery; trial preparation; drafting numerous motions, pre-trial brief, post-trial brief, appellate brief and reply brief, opposition to cert. petition. The trial court found for the Corps and AIMR; the Court of Appeals upheld the trial court on all material points. Government counsel was Fred Disheroon, Esq., Lands Division, U.S. Dep't of Justice, Washington, D.C. Opposing counsel was Joe Karaganis, Karaganis & Gail Ltd., 150 N. Wacker Drive, Chicago, Ill. 60606. (312)782-1905.

2. Potomac Electric Power Co. v. EPA, 650 F.2d 509 (4th Cir.), cert. denied, 455 U.S. 1016 (1981). (Circuit Judges: Widener, Phillips, Ervin).

From May 1980 through November 1980, I represented PEPCO in its petition for review of an EPA decision that the Chalk Point 4 Unit was subject to the new source performance standards for fossil-fuel steam generating units under the Clean Air Act. I was responsible for legal research and drafting a substantial portion of the brief. The Court of Appeals upheld the EPA decision. Opposing counsel was Bingham Kennedy, Esq., Lands Division, Department of Justice, Washington, D.C.

3. Group Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198 (Md.Ct.App. 1983)

From February 1981 through January 1983, I defended Group Health Association (GHA) in a negligence and wrongful death diversity action in U.S. District Court for the District of Maryland. GHA moved to dismiss on the grounds (1) that the claims were subject to mandatory arbitration under Maryland's Health Care Malpractice Claims Act, and (2) that Maryland did not recognize a wrongful death action for a non-viable child born alive. The district judge certified questions to the Maryland Court of Appeals. The Court of Appeals held for GHA that the action was subject to arbitration, but held also that an action did lie for wrongful death of a non-viable child. I was responsible for factual investigation; legal research; discovery; drafting pleadings, motion to dismiss, brief and reply brief in Court of Appeals. Opposing Counsel were Jonathan Azrael, Esq., Azrael & Gann, Baltimore, Md. and John Jude O'Donnell, Esq., Rockville, Md.

4. Berlin v. Chevy Chase Lake Corp., 16 10 0071 (American Arbitration Association)

From March 1981 through March 1982, I represented B.F. Saul and Chevy Chase Lake Corporation in an arbitration over the valuation of a minority interest in a closely-held corporation. We were urging a low value. I was responsible for development of facts, legal research, all aspects of trial preparation, development of expert testimony, pre-trial brief, post-trial brief. The final award was higher than our position, but substantially lower than that urged by our opponent. The arbitrators were Daniel Coon, David Gruber, Michael Jackley, c/o American Arbitration Association, 1730 Rhode Island Ave., N.W., Washington, D.C. Opposing counsel was Charles Lee Eisen, Esq., Kirkpatrick, Lockhart, 1800 M St., N.W., Washington, D.C. 20036.

5. Murray v. Henry J. Kaiser Co., 84-ERA-4 (DOL ALJ Roketenetz, 1984)

From September 1983 through May 1984, I defended Henry J. Kaiser Co. (HJK), constructors of the Zimmer nuclear power plant, against a "whistleblower" suit brought by a discharged employee (Murray) under the Energy Reorganization Act. The case was highly sensitive because it was litigated during a pending grand jury investigation into alleged illegal conduct by HJK in the construction of Zimmer, including some of the allegations raised by Murray. (See response to question no. 17 below.) I was responsible for factual development, discovery, drafting pre-trial statement, trial preparation, and post-trial brief. The case was tried before a Dep't of Labor ALJ in Cinncinati, Ohio. I personally tried half the case, with a Shaw, Pittman partner trying the other half. The ALJ decided for defendant HJK. Opposing counsel was Andrew B. Dennison, Esq., 200 Main Street, Batavia, Ohio 45103.

6. Arlex, Inc. v. B. Francis Saul, et al., Law No. 19962, Circuit Court of Arlington County (1978) (Winston, J.)

From November 1978 through September 1979, I represented the B.F. Saul Real Estate Investment Trust, defendant ground lessor in a suit by lessee who operated a Howard Johnson's hotel on the leased site. The dispute was over the proper method for calculating lease payments. On March 5, 1979, the trial court granted judgment to defendant on cross-motions for summary judgment. The plaintiff petitioned for appeal to the Virginia Supreme Court, which denied the petition on March 15, 1979. I was responsible for factual investigation, legal research, preparing motion for summary judgment, preparing brief in opposition to petition for appeal in the Virginia Supreme Court. Opposing counsel was LeRoy E. Batchelor, Esq., 2060 N. 14th St., Arlington, Va. 22201. (703)525-0102.

7. Rapps v. United States, et al., Civil No. 78-0612 (D.D.C.) (Parker, J.)

From October 1978 to March 1980 defended a former high-level CPSC official (Dimcoff) in an action brought by another former CPSC official (Rapps) against the CPSC and several current and former CPSC officials for violation of constitutional, statutory, and common law rights. The other federal defendants were represented by the Department of Justice. The case, which involved numerous complex legal issues, was settled on the eve of trial. I was responsible for factual investigation; extensive legal research; conducting most discovery; drafting numerous motions, including motions to dismiss, motions for summary judgment, pre-trial statement, etc. During discovery, I successfully overcame a claim of newsman's privilege by a journalist witness. Plaintiff Rapps was represented by Raymond Battocchi, Esq., Cole & Groner, 1730 K St., N.W., Washington, D.C. (202)331-8888. The other federal defendants were represented by Lawrence Moloney, Esq., U.S. Dep't of Justice, Civil Division, Washington, D.C.

8. Provident Life Ins. Co. v. Life Investors, Inc., v. Equitable of Iowa Companies, Civil Action No. A 78-1061 (D.N.D.)

From October 1978 through October 1979, I represented Equitable of Iowa, third-party defendant in a 16(b) short-swing profits suit. Provident Life Insurance Co. sued Life Investors, Inc. to recover short-swing profits realized by Life Investors on the sale of Provident stock to Equitable. Life Investors impleaded Equitable as a third-party defendant. The case was settled prior to trial. I was responsible for factual investigation, discovery, legal research, legal advice on settlement. Opposing counsel for Provident Life: James Collins, Esq., Boodell, Sears, Sugrue, Giambalvo & Crowley, One IBM Plaza, Suite 2650, Chicago, Ill. (312)222-9400; for Life Investors: Charles Mulaney, Jr., Esq., Mayer, Brown & Platt, 231 South LaSalle St., Chicago, Ill. (312)782-0600.

9. Marshall v. Schlumberger Well Services, OSHRC Docket No. 79-3912, Region III (ALJ Cutler)

From October 1979 to May 1980, I represented a Schlumberger subsidiary in defending against an OSHA complaint arising from a fatal explosion at a West Virginia job site. The case was settled by joint stipulation in May 1980. I was responsible for factual investigation, legal research, pleadings, settlement discussions. Opposing counsel were Marshall Harris, Esq. and Joseph Crawford, Esq. of the Office of Solicitor, U.S. Dep't of Labor, 3535 Market Street, Philadelphia, Pa. 19104. (215)596-5165.

10. Gutherz, et al. v. U.S. News & World Report, 86 Civ. 2517 (GLG) (S.D.N.Y.) (Judge G. Goettel).

From January 1986 to the present I have been lead counsel defending U.S. News & World Report in a large, multi-plaintiff age discrimination suit under the ADEA. The suit arises from the termination of half of U.S. News' advertising sales force after the magazine was taken over by a new owner. I have conducted and defended extensive discovery, represented U.S. News in all court appearances, drafted and argued motion for summary judgment. The motion was denied. Trial has been postponed until summer 1989. Opposing counsel are Judith Vladeck and Anne Vladeck of Vladeck, Waldman, Elias & Engelhard, 1501 Broadway, New York, N.Y. (212)354-8330.

17. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

1. I worked on the following matters as an associate at Shaw, Pittman, Potts & Trowbridge. (Except where otherwise noted, I was the sole associate, supervised by one partner.)

First Pennsylvania Bank (6/80 - 9/80) Prepared legal opinion for Board of Directors of First Pennsylvania Corporation (FPC) re propriety of advancing indemnification to Board Chairman who had retained separate counsel to defend lawsuit against FPC, the Chairman, and other individuals, alleging violations of antitrust laws and the Bank Holding Company Act. I did the factual investigation, legal research and analysis, drafted legal opinion, and made part of oral presentation to the Board.

Zimmer Grand Jury Investigation (9/83 - 9/84) Spent the substantial part of a year successfully defending Henry J. Kaiser Co. in connection with a grand jury investigation into possible violations of federal law in the construction of the "Zimmer" nuclear plant in Cincinnati, Ohio. Also handled a parallel NRC investigation and three related whistleblower cases. Extensive factual investigation, witness interviews, etc.

United States v. A.B. Chance Co., Civil Action No. 80-0034-P(H) (N.D.W.Va.) (1/79 - 5/80) Represented Parkersburg, West Virginia plant charged with violating Clean Water Act. The case was settled by consent decree entered May 19, 1980. I was responsible for factual investigation, legal research and drafting pleadings. Opposing counsel was Assistant U.S. Attorney William A. Kolibash, Dep't of Justice, Wheeling, West Virginia.

King v. GPU Nuclear, 83-ERA-10 (Dep't of Labor) (8/84 - 11/84) Defended GPU in whistleblower case arising out of Three Mile Island. Extensive discovery, trial preparation. Settled on eve of trial.

American Management Systems, Inc. v. Delphi Associates, Civil Action No. 79-2467-T (D.Mass.) (1/79 - 3/82) Worked with a partner and another associate representing AMS in a suit seeking damages for breach of contract and in quantum meruit. Defendant Delphi had been prime contractor on a project to design MMIS computer system for State of Illinois. AMS sued under its subcontract with Delphi to recoup substantial losses. Participated in extensive discovery and motions. Case was settled.

Miscellaneous Litigation: (10/78 - 3/82) Handled numerous smaller cases, including defense of Group Health Association in a series of medical malpractice suits, all of which settled: Robinson v. WMATA, Civil Action No. 6610-80 (D.C. Sup.Ct.); Davis v. Patow, M.D., Civil Action No. 12220-79 (D.C.Sup.Ct.); Stribling v. Mel-Art, Inc., Civil Action No. 650-80 (D.C.Sup.Ct.). Also handled numerous smaller commercial cases which were either decided on motion or settled, including Westminster Investing Corp. v. Nordheimer, Civil Action No. 2924-80 (D.C.Sup.Ct.); Malawer & Associates v. Centennial Contractors, Inc., Chancery No. 62053 (Cir.Ct. Fairfax Cty.)

GHA Labor Matters (1979-82, 84) Represented Group Health Association in a half dozen labor disputes with its physicians' union. All involved arbitration of grievances under the collective bargaining agreement -- one major grievance related to working conditions, the others related to individual disciplinary actions. All disputes were settled prior to, or during, arbitration. Extensive factual investigation, legal research, arbitration preparation, negotiation.

Virginia Condominiums (1979) Prepared all legal documents, prospectuses, etc., in connection with three of the earliest condominium conversions under the Virginia Condominium Act. The three projects were: Horizon House, Huntington Club, and Telegraph Hill. The Horizon House documents were distributed by the state as "models".

B.F. Saul REIT (1981) Worked on various securities matters for REIT, including advice and submissions to SEC pursuant to Rule 14a-8 re omission of shareholders' proposals from proxy material.

2. I handled the following matters as a partner at Shaw, Pittman:

National Air Transportation Association (3/85 - 5/85) Represented NATA in connection with proposed IRS regulations on the use of employer-provided aircraft. Prepared and submitted formal comments.

National Automobile Dealers Association (2/85 - present) Represent NADA on a variety of tax issues. In 1985 and 1986 prepared and submitted a series of formal comments on proposed IRS regulations re taxation of auto salesmen's demonstrators.

Knights of Columbus (12/84 - present) Represent Knights of Columbus in connection with preserving the tax exemption for "fraternal benefit societies" under Section 501(c)(8). Prepared and submitted numerous comments during 1985 and 1986. Assisted K of C in prevailing on Administration and House Ways & Means Committee to preserve exemption in "Treasury II" and subsequent Tax Reform legislation.

Mutual of Omaha (7/85 - 12/85) Represented Mutual of Omaha in connection with OPM proposed regulations relating to the Federal Employees Health Benefit Program, a substanial part of the company's business. Prepared and submitted formal comments.

Carolina Power & Light (4/85 - 7/85) Researched and prepared comprehensive legal memorandum assessing CPL's potential claims against Westinghouse for installing allegedly defective generators in CPL's nuclear power plant.

Sallie Mae (1/88 - 3/88) Represented SLMA in connection with Department of Education regulations relating to due diligence requirements under the Guaranteed Student Loan Program. Analyzed potential legal challenges to regulations.

Taiwan Power (9/86 - 10/88) Represented the government-owned utility of Taiwan in connection with its pre-sanction, long-term supply contracts for Namibian uranium. Unsuccessfully sought from Treasury Department an interpretation of sanctions legislation that would allow for "in transit" processing of Taiwan Power's uranium. Also sought legislative relief.

Pico Ski Resort (6/87 - present) Represent Vermont ski resort in resisting initial efforts by the Department of Interior to locate Appalachian Trail through the resort in a way that would cripple future operations. Prepared extensive submissions and presentations to DOI relating to its legal obligations under the National Trail Systems Act.

Equitable of Iowa (11/87 - 9/88) Represented Des Moines-based company in opposing a UDAG grant for the development of a major shopping mall on the outskirts of Des Moines. Prepared extensive submissions to HUD. Prepared complaint. The grant was not awarded.

U.S. News & World Report (8/87 - 9/87) Successfully assisted U.S. News in obtaining FCC recognition of exception to Equal Time rule for television series featuring David Frost interviews of Presidential candidates. Made written and oral presentations to FCC staff and commissioners.

Miscellaneous Litigation Currently representing Emerson Electric in prosecuting claims against the United States for "over and above" work on two defense-related contracts. Matters are pending before the Armed Services Board of Contract Appeals.

Other Legal-Related Activities In 1986 I served on two peer review panels for the National Institute of Justice. In the fall semester of 1987, I assisted a Shaw, Pittman colleague by teaching one of his Legal Research & Writing sections at GMU Law School on a voluntary, unpaid basis. In 1985 and 1986, I spoke regularly on "The Presidency" to high school students as part of the Close-Up Foundation's program.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

None, except for my withdrawal payment from Shaw, Pittman, Potts & Trowbridge. The payment will be made pursuant to the firm's January 1987 partnership agreement, which has been reviewed by appropriate Department of Justice ethics officials. Under the agreement, I will receive: (i) my capital account; (ii) a severance payment based on a fixed formula; (iii) the pro rata share of my 1989 draw up until my withdrawal of the firm. I expect the total amount of my withdrawal payment from Shaw, Pittman, Potts & Trowbridge will be approximately $75,000. The amount of payment is fixed at the time of my departure, and I will have no continuing interest in the firm. The firm has the option of making the payment in installments over two years, but I expect full payment within a year.

In addition, I am considering selling my interest in 2300 N St. Associates, a real estate partnership that owns interest in the commercial office building located at 2300 N St., N.W. Washington, D.C. As noted in my SF278, I estimate the value of my interest is between $50,000 and $100,000.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining in the areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

Due to the nature of my assets and the position I have been nominated for, I am not likely to have a financial conflict. If I do, I will follow the requirements of 18 U.S.C. §208 by either disqualifying myself or, if appropriate, obtaining a waiver.

While I will not have a continuing financial relationship with Shaw, Pittman, Potts & Trowbridge, matters involving the law firm may arise. If this occurs -- of if other potential non-financial conflicts arise -- I will consult with my assigned ethics counsellors at the Department. I understand the Department follows the guidelines of the

Administrative Conference of the United States to resolve potential non-financial conflicts of this sort.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.**

   No.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Government Act of 1978, may be substituted here.)**

   Please see my SF278.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

   Please see attached financial statement.

6. **Have you ever had a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your titles and responsibilities.**

   Vice Chairman, D.C. Lawyers for Reagan-Bush, 1984
   Bush for President 1988 (Vice Presidential Candidate Screening Team)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household. (Rounded to nearest thousand)

ASSETS			
Cash on hand and in banks	203,000		
U.S. Government securities—add schedule			
Listed securities—add schedule			
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	425,000		
Real estate mortgages receivable			
Autos and other personal property	54,000		
Cash value—life insurance			
Other assets—itemize:			
Retirement Accounts: TIAA-CREF, IRA, Keogh	35,000		
Total assets	717,000		

CONTINGENT LIABILITIES*			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured	12,000		
Notes payable to relatives			
Notes payable to others			
Accounts and bills due	1,000		
Unpaid income tax (approx '88)	8,000		
Other unpaid tax and interest			
Real estate mortgages payable—add schedule	194,000		
Chattel mortgages and other liens payable	15,000		
Other debts—itemize:			
Total liabilities	230,000		
Net worth	487,000		
Total liabilities and net worth	717,000		

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	No		
Are you defendant in any suits or legal actions?	No		
Have you ever taken bankruptcy?	No		

* As a partner in Shaw, Pittman, I am contingently liable for the partnership's obligations. However, upon withdrawing from the partnership, I will be released from all such contingent liability. Apart from this, I have no other contingent liabilities

Real Estate Schedule	Value	Mortgage
House In Falls Church, Va.	350,000	194,000
Interest in 2300 N St. N.W. Washington, D.C.	75,000	

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My law partnership has, for the past several years, made substantial cash contributions to groups providing legal services to the indigent and needy. The firm also supports an active in-house pro bono program which has been widely commended in the Washington legal community.

In 1980 I reviewed and critiqued a brief prepared by another associate in a pro bono Bivens action against a government official, and I served on a mock appellate panel to prepare the associate for oral argument. (4.5 hrs.)

In 1981 I represented pro bono a young retarded woman who was discharged from her job at a large department store. After my calls and correspondence to the parent company, the store rehired the woman and apologized. The matter involved legal research into possible state and federal claims, drafting demand letters, etc. (9.0 hrs.)

In early 1982 I brought into the firm, as a pro bono matter, two Ethiopian nationals seeking asylum. The work on these cases was done by a more junior associate with expertise in immigration. One of the clients obtained asylum, the other ultimately decided not to seek it. (2.0 hrs.)

In 1985 I agreed to assist, on a pro bono basis, the Catholic League for Religious & Civil Rights in bringing an action challenging an A.I.D. policy which barred natural family planning groups from receiving grants unless those groups also promoted artificial methods of birth control. The matter was settled in its early stages when A.I.D. agreed to change its policy. (12 hrs)

In early 1986 I assisted on a pro bono basis the Jamestown Foundation with respect to legislation to assist defectors. I also supervised an associate providing pro bono assistance to a defector. (30.50 hrs.)

In 1987 I assisted, on a pro bono basis, the parents' association of a parochial school in their legal efforts to keep the school from being closed. (53 hrs.)

2. **Do you currently belong, or have you belonged, to an organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.**

I am currently a member of the Knights of Columbus, which is an all-male Catholic fraternal order. I have been a member since 1984.

While an undergraduate at Columbia University (1968-71), I was a member of Sigma Nu Fraternity, a national social fraternity. It was, at least, de facto all-male, and probably was so de jure.

AFFIDAVIT

I, WILLIAM P. BARR, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

3/14/89	William P. Barr
(DATE)	(NAME)

Margaret Mae Gardiner
(NOTARY)

Commission Expires: 5/14/90

The **Chairman**. The hearing is adjourned.

[Whereupon, at 4:27 p.m., the committee was adjourned.]

CONFIRMATION HEARING ON KENNETH WINSTON STARR

TUESDAY, MAY 2, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:11 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Metzenbaum, Heflin, Thurmond, Hatch, Grassley, and Specter.

OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. The hearing will come to order, please.

In the interest of allowing our colleagues who are here to introduce our witness the opportunity to move about their other equally important tasks of the day, we will move on for a moment. Also in the interest of seeing to it that the youngest Starr gets the ice cream cone she was promised, if all goes well, we will also move forward.

Before we begin, a little out of order here but in the interest of waiting for the opportunity for my senior colleague, who is necessarily delayed a moment, Senator Thurmond, before you are even formally introduced, Judge Starr, would you be kind enough to introduce your family to the committee.

Judge STARR. Yes. Thank you, Mr. Chairman. I am pleased to do so. My wife Alice is here.

The CHAIRMAN. Alice, would you mind standing so we can see you? Welcome, welcome.

Judge STARR. And our three children: Randall, who will now be angry with me—we know him as Randy, Carolyn, and Cynthia.

The CHAIRMAN. Cynthia wants to make sure we see her. Hello, Cynthia. Cynthia is the one that is going to get the ice cream cone if all goes well?

Judge STARR. Yes, and I hope to share it with her. [Laughter.] I usually do. Rainbow sherbet is her favorite.

And Alice's parents are here, Mr. and Mrs. Mendell from Monroe County, FL.

The CHAIRMAN. Mr. and Mrs. Mendell, welcome.

Judge STARR. And if I may, Don Oswald, who is with us for the year, from Iowa.

The CHAIRMAN. I spent a lot of time in your State, Don. It is a lovely State. Hope to see you again someday. [Laughter.]

Senator **METZENBAUM**. You could not resist, Joe.

The **CHAIRMAN**. Thank you all for being here. Randy, I want you to know that all of us have had children, all of us in public life here, and we all get certain things that we are told by our children to do and not to do. You probably tell Daddy, "Don't call me Randall in public." Well, the last time before I ran, in 1978, we got the family together. I have two boys; they were about your age. I said, "Should we run again?" They said, "Yes, except one thing, Daddy." This is a true story. They said, "Please, can you do a couple things different this time?" I said, "What are they?" One turned to the other and said, "You tell him, Bo." My oldest son said, "Well, Daddy, No. 1, we don't want to go on any more parades. And, No. 2, when you introduce us, please don't make us stand up on a chair to say hello to everybody." So we all have those things our children don't want us to do.

Again, in the interest of time, and I know our colleague Senator Thurmond will be here in a moment, why don't we begin? The way we will begin is start with the introductory statements by the distinguished Senators who are here, Judge Starr, to introduce you. Then I will have an opening statement, and my colleague, Senator Thurmond, will and possibly others of my colleagues. Then we will ask you to stand and be sworn, and then we will begin.

But why don't we begin now with the senior Senator from the State of Virginia? Senator Warner, welcome, and please proceed.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **WARNER**. Thank you, Mr. Chairman.

I have looked forward to this day with some trepidation, and I will mention why shortly. Members of the committee, I am pleased to join my distinguished colleague from Virginia and our distinguished colleague, the former Governor of North Carolina. It is a pleasure to be here this morning to introduce——

The **CHAIRMAN**. Would you mind pulling the mike up? This room is worse than most of the hearing rooms. Do you mind pulling that very close to you? Otherwise, they cannot hear you in the back.

Senator **WARNER**. It is a pleasure to introduce to you Kenneth W. Starr, the President's nominee to be Solicitor General of the United States.

We are truly fortunate that Ken is the President's nominee. I know that the members of the committee examined his background, and I am sure you find it as impressive as I do. Ken served as law clerk to Chief Justice Warren Burger, practiced law for a number of years with the firm of Gibson, Dunn & Crutcher, and served as counselor to the Attorney General at the Department of Justice.

Since 1983, Ken has served on the U.S. Court of Appeals for the District of Columbia Circuit, where he has shown himself a very able jurist with a firm grasp on the law, equity, and fairness.

I have had the pleasure to know Ken for a number of years and have followed his career with great interest. I am also honored to know his wife and his family for many years. Ken is joined here today by both. You have introduced them, Mr. Chairman, and that closes the brief formal statement.

I would like to make a confession at this point. Shortly after I joined the U.S. Senate, I got to know these wonderful people very well. The White House called me up one day and said, "Senator, we are thinking about nominating Ken Starr to the fourth circuit." And I said, "I cannot believe what you are telling me." I have known him, and I thought suddenly back in my own days in the law where I was admitted as a partner to my firm, I think at about the age of 34 or 35; Barrett Prettyman, whom you know was my partner then.

Also, I had served as law clerk here on the circuit that you now sit on, and I remember all the curmudgeon judges down there, and I said, "Wait a minute. This is not possible that a man 37 years old has enough knowledge and experience to come on the Federal Circuit Court of Appeals to serve the Commonwealth of Virginia." And so that was the end of the fourth circuit, and the President had the wisdom to ignore my judgment and put him on the D.C. circuit.

I often wonder, had I remained quiet, as I should have been, and he had gone on the fourth circuit, he might not be sitting here today. He would have gone into obscurity in that part of the world and never caught the attention of everybody here in the Nation's Capital.

So I admit a profound error in judgment, and I am here today to make amends and ask for forgiveness from my good friend. But I think this is one of the most outstanding young men—and, I might say, families, too—that I have ever known in my life. I am privileged to say they are the best of friends today despite my errant ways in prior years.

I thank the chairman and the members for indulging this Senator.

The CHAIRMAN. I thank you, Senator. I have made many mistakes myself, but one that I have never made is I have never held a man's youth against him. [Laughter.]

But I have made many, many mistakes, as the whole world knows.

Now, we have our junior colleague, who I still call "Governor" on occasions, Senator Robb.

STATEMENT OF HON. CHARLES S. ROBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ROBB. Mr. Chairman, thank you. I am delighted to be here with you and Judge Starr and with my distinguished former colleague, as well as a former Governor and now Senator, Terry Sanford of North Carolina, to speak on behalf of Judge Ken Starr.

I will try not to repeat any of the mistakes that my senior colleague has made. As one who clerked on the fourth circuit and has a very high regard for that, I know he would not want to be associated with in any way diminishing the opportunities of those who served on that circuit. So we can amend the record already here this morning so neither one of us get in any trouble on that score.

He does have a truly distinguished record, and it is all available for you and for the other members of the committee. I will not go into any of that.

I would like to simply mention that we have someone who has an exceptional record in community service. I think if you look behind the witness table in this particular case this morning to Alice and other members of the family, you will find a very broad cross-section of community leaders. This is not always the case in those who are appointed to high office. They sometimes have been very busy in the pursuit of their own careers and have not had the opportunity to spend as much time as Ken and Alice and their family have in the community.

I received a number of calls from mutual friends on both sides of the aisle, extolling the virtues of one Judge Ken Starr over the last few weeks, and I am delighted to appear on his behalf. He has been extremely active in his church, held a number of important positions, including being a Sunday schoolteacher at the Trinity United Methodist Church in McLean. He has held several positions of responsibility and continues in a position of responsibility on the Langley Non-Profit Housing Development Corp. in McLean, which is providing group homes for mentally retarded adults in northern Virginia.

Ken was kind enough to come by my office, and we discussed this. And I was delighted to hear that he has not only had this active participation but plans, in this and his church work and as a coach of Little League, to continue some of the activities that he has had. So you have someone who has been extremely active in the community, not just living in northern Virginia, as a number of those who have had some prior Federal service do, but actively engaged and involved in the community and plans to stay so. His wife, Alice, is equally involved. I happen to know of at least two boards that she and my bride happen to serve on.

The bottom line is it is a family that has made a commitment to the community in which they live and plan to continue that commitment. That frequently is beyond the qualifications for office and the position of Solicitor General and seems to me to be terribly important.

So I am very pleased to join with Senator Warner and with Senator Sanford in recommending to this committee Judge Starr for confirmation as Solicitor General of the United States.

The **Chairman**. Thank you very much, Senator.

Now, the distinguished Senator from North Carolina, who has a slightly different connection, I understand, with Judge Starr. Welcome.

STATEMENT OF HON. TERRY SANFORD, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator **Sanford**. Mr. Chairman, thank you very much, and members of the committee. I am pleased to be here with my colleagues from Virginia to join in the recommendation and endorsement of Judge Kenneth Starr to this committee.

Judge Starr was born in Texas, practiced law in California and Washington, DC, and lives in Virginia. It is true that my mother was a native of Virginia, but that is not exactly why I am here to join in the introduction. Judge Starr has certainly had a distinguished legal career, currently serves on the bench of the District of Columbia Court of Appeals, and was counselor to the U.S. attorney. His legal writings cover a variety of topics, and he is an exceptionally vivid writer and speaker.

However, and this explains to the senior Senator from Virginia, why this young man advanced so rapidly and achieved so much. He is a graduate of the Duke University Law School. [Laughter.]

I have a considerable fondness for that institution and a great deal of pride in its graduates. While at Duke, Ken Starr was president of the Duke International Law Society, served as the comment editor for the Duke Law Journal, and he now remains a member of the law school's board of visitors. Certainly, Judge Starr is a credit to Duke Law School, as well as to the legal profession and to the judiciary. I congratulate President Bush for nominating him to be Solicitor General.

The CHAIRMAN. Thank you. I appreciate all three of you taking your time to be here. It is grand testimony to your ability and the high regard in which you are held, Judge Starr, to have three such distinguished men appear before the committee.

I know that you have obligations to do exactly what we are doing now, sitting in a committee somewhere, and so you are excused. Thank you very, very much.

Judge Starr, while you are on your feet, why don't you stay on your feet and be sworn, if you will?

Do you swear that you will tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge STARR. I do.

The CHAIRMAN. Please be seated.

As we approach the end of the Supreme Court's term for 1988, this committee begins its hearing on a nomination that well may influence the Supreme Court for several terms to come—that of Judge Kenneth Starr to be Solicitor General of the United States of America.

As the chief advocate for the Federal Government in our Nation's lower courts and in the Supreme Court, the Solicitor General is among the most important officers of the United States. It is commonly said that the Solicitor General is the only official in the Government who is required by statute to be "learned in the law." That is surely true, but to my mind, a lesser known fact better symbolizes the unique nature of the office: Although he is a member of the Department of Justice, the Solicitor General also has permanent chambers in the Supreme Court. That he keeps offices within two of the three branches of our Government—and is subject to the advice and consent of the third, the U.S. Senate, I might add—truly underscores, in this Senator's mind, at least, the broad powers and unique responsibilities of the Solicitor General of the United States.

What it created the office of the Solicitor General in 1870, the 41st Congress set the standard, a very high standard, in these words, and I quote: "We propose to have a man of sufficient learning"—I assume if that were today they would say "a person." But, "We propose to have a man of sufficient learning, ability and experience that he can be sent * * * into any court whenever the Government has an interest in litigation, and there present the case of the United States as it should be presented."

While it clearly anticipated the attributes necessary to lead the office, Congress probably did not foresee the extent of the Solicitor General's present-day power and importance.

One index of that power and importance is the degree of success the Solicitor General enjoys in litigation before the Supreme Court. That success can be measured in several different ways. Looking at the Court's 1983 term, which is representative of other recent terms as well, one finds:

First, that the Court granted 79 percent of the Solicitor General's requests for review, compared to granting 3 percent of the requests by all others who made requests before the Court; that the Solicitor General appeared in 65 percent of the total number of cases heard by the Supreme Court, either as a party of a "friend of the Court"; and that the Solicitor General won a remarkable 83 percent of the cases outright, and that he won partial victories in an additional 2 percent.

Very simply, because the Solicitor General exercises considerable influence on which cases the Supreme Court hears in the first place, and on the way those cases are ultimately decided, he exercises considerable influence on the development of constitutional law in America. Indeed, other than the justices themselves, in my opinion no other person, year after year, term after term, is likely to influence the development of constitutional law more than the Solicitor General.

Because of that influence and the extraordinary responsibilities the Solicitor General exercises, one of the issues that I would like very much to raise with you today, Judge Starr, is the question of independence. The location of your two offices—one in the executive branch and one in the judicial branch—symbolizes the importance of that question in this Senator's mind and illustrates your dual roles and dual responsibilities.

First, there is your office at the Department of Justice and the policymaking role that the Solicitor General is typically expected to play. After all, by statute, you are subject to the supervision and direction of the Attorney General and, ultimately, the President, and you must naturally be responsive to them.

Second, there is your office at the Supreme Court and the quasi-judicial role, as one commentator has termed it, that you must play. In a very real sense, Solicitors General of years past have earned this permanent place in the Court—and they have earned it—because the Court has come to rely on the Solicitor General's rigorous legal analysis, total candor and ability to help regulate the Court's docket. Simply put, the Supreme Court and the Solicitor General have been bonded in ways that the Court and the Attorney General have not been, and probably should not be, bonded.

Judge Starr, I intend to discuss today your views on how to maintain and protect the tradition of independence and the autonomy of the Solicitor General's office, and how you expect, should you be confirmed, to deal with these two related—yet often inconsistent—roles.

I also intend to explore your views on a number of very specific issues, not the least important of which is the subject of stare decisis. That term, as you know, translated literally means "to stand by things decided." This term not only connotes the notion of some continuity but represents the doctrine of respect for precedent. In that regard, I intend to ask you when you believe it is appropriate for the Solicitor General to ask the Court to reverse one of its earlier decisions, and how you intend to resolve the potential conflict between the administration's short-term interest in overruling a case and what I believe would be your long-term interest in the orderly development of the law.

In order to get a sense of your philosophy and approach to issues of constitutional import, I also intend to ask you about some of your speeches and articles. I believe I have read all the ones that you have submitted, and I suspect most of the ones that you have made. For while you may be discarding your black robes for the formal striped pants, vest and tails traditionally donned by the Solicitor General when he presents his oral argument to the Court, your philosophical and constitutional views remain the same, I suspect, and of critical import to me and, I suspect, to the committee.

Judge Starr, should you be confirmed, you will find that there are significant shoes that have to be filled, immense shoes to fill on the fifth floor of the Department of Justice. John Davis, Robert Jackson, Archibald Cox, and Thurgood Marshall, just to name a few—and I suspect my colleagues would have other names to add to that list—these men exemplify the tradition of competence, integrity and unquestioned legal judgment that have come to characterize the office of the Solicitor General.

There is an inscription, as you well know, that is now carved into the rotunda of the Attorney General's office. First spoken by Frederick Lehmann, who served as Solicitor General from 1910 and 1912, that inscription reads, and I quote: "The United States wins its point whenever justice is done its citizens in the courts."

May that be your creed as well, Judge Starr, should you become the next Solicitor General of the United States.

[The prepared statement of Senator Biden follows:]

U.S. Senator Joseph R. Biden, Jr.
Opening Statement on the Nomination of Judge Kenneth Starr to be Solicitor General of the United States
Washington, D.C.
Tuesday, May 2, 1989

As we approach the end of the Supreme Court's 1988 Term, the Judiciary Committee begins its hearing on a nomination that may well influence the Court for several terms to come -- that of Judge Kenneth Starr to be Solicitor General of the United States.

As the chief advocate for the federal government in our nation's lower courts and in the Supreme Court, the Solicitor General is among the most important officers of the United States. It is commonly said that the Solicitor General is the only official in our government who is required by statute to be "learned in the law." That is surely true, but to my mind, a lesser-known fact better symbolizes the unique nature of the office: Although he is a member of the Department of Justice, the Solicitor General also has permanent chambers in the Supreme Court. That he keeps offices within two of the three branches of our government -- and is subject to the advice and consent of the third, I might add -- truly underscores, in this Senator's mind, the broad power and unique responsibilities of the Solicitor General of the United States.

When it created the office of the Solicitor General in 1870, the 41st Congress set a high standard. In its words:

> We propose to have a man of sufficient learning, ability and experience that he can be sent...into any court whenever the government has an interest in litigation, and there present the case of the United States as it should be presented.

While it clearly anticipated the attributes necessary to lead the office, Congress probably did not foresee the extent of the Solicitor General's present-day power and importance.

One index of that power and importance is the degree of success the Solicitor General enjoys in litigation before the Supreme Court. That success can be measured in several different ways. Looking at the Court's 1983 Term, which is representative of other terms as well, one finds:

o that the court granted 79 percent of the Solicitor General's requests for review, compared to granting three percent of the requests filed by others;

o that the Solicitor General appeared in about 65 percent of the total number of cases heard by the Court, either as a party or as a "friend of the Court;" and

o that the Solicitor General won a remarkable 83 percent of his cases.

Very simply, because the Solicitor General exercises considerable influence on which cases the Supreme Court hears in the first place, and on the way those cases are ultimately decided, he exercises considerable influence on the development of constitutional law. Indeed, other than the nine justices themselves, no other person -- year after year, term after term -- is likely to influence the development of constitutional law more than the Solicitor General.

Because of that influence and the extraordinary responsibilities the Solicitor General exercises, one of the issues that I want to raise today is the question of independence. The location of your two offices -- one in the executive branch, and one in the judicial branch -- symbolizes the importance of that question, and illustrates your dual roles and dual responsibilities.

First, there is your office at the Department of Justice and the policy-making role that the Solicitor General is typically expected to play. After all, by statute you are subject to the supervision and direction of the attorney General and, ultimately, the President, and you must naturally be responsive to them.

Second, there is your office at the Supreme Court and the "quasi-judicial" role, as one commentator has termed it, you must play. In a very real sense, Solicitor Generals of years past have earned this permanent place at the Court, because the Court has come to rely on the Solicitor General's rigorous legal analysis, total candor and ability to help regulate the Court's docket. Simply put, the Supreme Court and the Solicitor General have been bonded in ways that the Court and the Attorney General have not shared.

I intend to discuss today your views on how to maintain and protect the tradition of independence and autonomy of the Solicitor General, and how you expect, should you be confirmed, to deal with these two related -- yet often inconsistent -- roles.

I also intend to explore your views on a number of very specific issues, not the least important of which is the subject of stare decisis. That term -- translated literally to mean "to stand by things decided" -- represents the doctrine of respect for precedent. In that regard, I intend to ask when you believe it is appropriate for the Solicitor General to ask the Court to reverse one of its earlier decisions, and how you intend to resolve the potential conflict between an Administration's short-term interest in overruling a case and what I believe should be your long-term interest in the orderly development of the law.

In order to get a sense of your "philosophy" and approach to issues of constitutional import, I also intend to ask you about some of your speeches and articles. For while you may be discarding your black robes for the formal striped pants, vest and tails traditionally donned by the Solicitor General when he presents his oral argument to the Court, your philosophical and constitutional views remain critically important.

Should you be confirmed, you will find that there are immense shoes to fill on the fifth floor of the Department of Justice. John Davis, Robert Jackson, Archibald Cox and Thurgood Marshall, to name just a few, exemplify the tradition of competence, integrity and unquestioned legal judgment that have come to characterize the office of the Solicitor General. The polestar for these solicitors was the inscription that is now carved into the rotunda of the Attorney General's office. First spoken by Frederick Lehmann, who served as Solicitor General between 1910 and 1912, that inscription reads:

> The United States wins its point whenever justice is done its citizens in the courts.

May that be your creed as well, Judge Starr, should you become the next Solicitor General of the United States.

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The CHAIRMAN. Now, my colleague is still unavoidably absent, but I yield to my colleague from Utah, if he has an opening statement.

Senator HATCH. Well, thank you, Senator Biden. I want to welcome Judge Starr and his family and his wife's family here today. We are very proud of you. As a matter of fact, I believe that the President has made a terrific choice for the very important position of Solicitor General, which the distinguished chairman of this committee has, I think, very carefully outlined.

You have had a very impressive, very remarkable career. You completed your legal education at Duke University School of Law, and I think you began one of the most rapid rises in the legal profession that I have seen, and rightly so.

In 1973 and 1974, you served as law clerk for the Honorable David Dyer on the Circuit Court of Appeals for the Fifth Circuit. You then followed that experience in the private sector as an associate in the California law firm of Gibson, Dunn & Crutcher, one of the better law firms in the country. In 1975, you left that firm to serve as law clerk to Chief Justice Warren Burger on the Supreme Court. So you have had that excellent experience. You understand the internal workings of the Supreme Court, and you understand a lot about some of the present justices there.

In 1977, after that clerkship, of course, you then again returned to private practice with Gibson, Dunn & Crutcher in its Washington, DC, office. And after a little over 3 years, you again returned to public service at the Department of Justice in becoming the counselor to Attorney General William French Smith, serving in that capacity from 1981 to 1983, and then you were nominated to fill the vacancy on the U.S. Court of Appeals for the District of Columbia.

As a member of that particular court, which is often referred to as the second most important court in the country, you have participated in literally hundreds of cases covering just about every conceivable subject that might be argued before the Supreme Court. And my appraisal, having watched you, having read some of your opinions, is that you know the issues and you know the law. And I have been very impressed. And I think this experience is truly befitting someone who is asked to serve as the chief advocate for the Government before the Supreme Court of the United States of America.

Now, because of your time on the bench and your association, both as a clerk and as a judge, with some of the great judicial minds of our time, I think you are in a unique position for understanding the appellate process. You have a special insight on how judges and justices approach the cases before them, and I think this is going to serve the Government well as you serve in presenting arguments to the judiciary itself and to the Supreme Court.

I think you have also appeared to very well handle the administrative and organizational duties associated—that will be required of you in this new position as a result of what I have seen you do in the past. In a recent "Legal Times" article regarding this nomination, both Attorney General Smith and Chief Judge Patricia Wald were favorably quoted regarding your abilities to handle these responsibilities.

So, Mr. Chairman, Judge Starr is in my opinion eminently qualified, well qualified to fill the vacancy to which he has been nominated. He has received high marks from his colleagues on the bench and from those who do not always agree with his views. He is a good family man. He has a strong sense of what is fair, both in the law and otherwise. And so we welcome you before this committee today, and I appreciate your willingness to accept the President's nomination to this important post. I just wish you the very best, and I expect you to be one of the all-time great Solicitor Generals of the United States.

Judge STARR. Thank you, Senator.

The CHAIRMAN. I ask unanimous consent that statements of Senator's Kennedy and Simon be entered in the record at this point in its entirety. Without objection, it will be so entered.

[The prepared statements follow:]

STATEMENT OF SENATOR EDWARD M. KENNEDY
AT THE CONFIRMATION HEARING ON THE NOMINATION
OF JUDGE KENNETH W. STARR TO BE SOLICITOR GENERAL
MAY 2, 1989

I want to commend Judge Starr on his nomination to be Solicitor General. He has already had a distinguished career in the law -- on the bench, in the Justice Department, in private practice, and as a law clerk to Chief Justice Burger.

The Solicitor General holds a unique and important position within our legal system. With rare exception, he alone speaks for the United States in the Supreme Court, and he alone determines which cases the federal government may appeal.

In selecting cases for consideration, the Supreme Court often defers to the Solicitor General's views; cases in which he seeks review are nearly 27 times more likely to be granted review than those brought to the Court by other parties. And in deciding cases involving federal statutes, the Court frequently adopts the interpretation advanced by the Solicitor General, since he represents the views of those who are charged with implementing the federal law.

The Solicitor General thus has enormous power to shape the course and development of American law. With this power comes special responsibility. Of all of the legal officers in the Justice Department, only the Solicitor General is required by statute to be "learned in the law." To maintain the confidence of the Court, the Solicitor General must maintain the highest standards for integrity, intellect and accuracy. And, perhaps most important, he must refuse to assert positions that lack support in the law.

This last responsibility highlights the competing pressures on the Solicitor General. As a member of the Executive Branch, he is unquestionably entitled to advance the policy positions of the Administration he serves. On occasion, these positions may well differ from his own views on what the law is or ought to be. But as an officer of the Supreme Court, he must refrain from advancing such positions where they lack sound support in the law. When the rule of law and partisan politics are in conflict, the rule of law must prevail.

These principles have long been upheld by many outstanding lawyers who have served as Solicitor General. In recent years, however, they have not always been scrupulously observed. In certain instances, the Solicitor General's Office has sought to use the Supreme Court to reopen legislative or constitutional battles that the Administration had lost in Congress or the courts.

In considering Judge Starr's nomination to be Solicitor General, I do not pass judgment on the legal views he has expressed in his opinions, his writings or his speeches. I expect to support his nomination, and I wish him every success as Solicitor General if he is confirmed.

STATEMENT OF SENATOR PAUL SIMON
ON THE NOMINATION OF JUDGE KENNETH W. STARR
TO BE SOLICITOR GENERAL OF THE UNITED STATES
May 2, 1989

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I look forward to reviewing the background, experience and record of Judge Kenneth Starr, the President's nominee to be Solicitor General. The office of Solicitor General is a critically important one, not only for the three branches of government but for all of the American people.

The Solicitor General is the United States government's counsel before the Supreme Court. He or she is the People's Lawyer before the branch of government with which the American people have the least direct contact or influence. More so than almost any other advocate before the Court, the Solicitor General is responsible for safeguarding "Equal Justice Under Law" for every man and woman of the nation.

Again, I will review Judge Starr's testimony before the Committee and his responses to my inquiries with great care. Without commenting or putting a judgment on his legal philosophy, I can say today that he has already had a distinguished legal career. However, based on some of his writings both on and off the bench, I want to inquire about his overall sensitivity, both as to Congress and the weight placed on our intent in enacting legislation and as to his role as a legal advocate.

The CHAIRMAN. I will now yield to my colleague, Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Judge Starr, I am frank to tell you that I do not know nearly as much about you as do a lot of other people who have introduced you, and perhaps some on this committee as well. Therefore, I approach this hearing with pretty much of an open or clean slate. But I think you carry somewhat of a burden, a very slight one, in connection not with you but with respect to your predecessor, because I have seen one of the ablest legal scholars in this country act in the role of Solicitor General, and I have seen him totally politicize that office.

I have always held the Solicitor General on a certain plane, a bit above politics. He is the one that goes into the Supreme Court with his black coat on and long tails, and he is the one that looks the part. And as a young lawyer and as a law school student, I always thought of the Solicitor General as being something just a cut above. Some have referred to the Solicitor General as the "tenth Justice."

During the Reagan years, I saw where the Solicitor General literally tried to politicize the office, to become an advocate not for what the law is or should be based upon precedents, based upon scholarly endeavor, but based upon the politics of the administration.

That, in my opinion, doesn't serve the Nation well. It would not serve the Nation well if those political opinions were in agreement with my own or whether they were in disagreement with my own. I think the Solicitor General's position should return to that level which it had attained over a period of many years. The Solicitor General is the legal scholar that appears before the Supreme Court in representing the United States of America, not the counsel or the advocate for a political point of view of either the President or the Attorney General.

I have seen that happen; not that often in America's history, but very recently for sure. And I would hope that in your discussion with us and perhaps in your opening statement, you would address yourself to that concern that this Senator has, because, to me, I think it goes to the very basic question of Kenneth Starr or John Smith or Peter Jones to be a Solicitor General. And I hope that we may hear from you and your views on that subject.

Thank you very much.

The CHAIRMAN. Thank you, Senator.

Welcome back from the White House, Senator.

Senator THURMOND. Thank you very much.

The CHAIRMAN. I explained you were necessarily absent. Would you like to make an opening statement?

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Very briefly, thank you, Mr. Chairman.

Judge Starr, welcome to the Judiciary Committee. You have visited here before, but now you have come again to be considered for this nomination. You have been nominated by President Bush to serve as Solicitor General of the United States. I know that you are very familiar with the mission and responsibilities of the Department of Justice, having served as counselor to Attorney General William French Smith, I believe for two years, from 1981 to 1983.

Since 1983, you have served with distinction as U.S. circuit court judge. I believe that your prior service at the Department of Justice and as a circuit court judge speak highly of your abilities.

Mr. Chairman, Judge Starr is a man of integrity, intellect, and capacity. As the Solicitor General, he will be required to consider some of the most important issues that face our Nation. I am confident he will do so in a manner that demonstrates a high degree of expertise and professionalism.

Judge Starr understands the importance of this position and will do all in his power, in my opinion, to uphold the honor and tradition of the Solicitor General's office.

Judge Starr, again, we welcome you to the committee. And I want to ask you, do you realize that you are giving up a lifetime job on the circuit bench that pays full salary even after you retire to take this temporary job here that does not pay as much?

Judge **Starr**. I am afraid I do, Senator. My wife has reminded me of that more than once.

Senator **Thurmond**. I expect your wife is concerned about that, too, isn't she?

Judge **Starr**. She has her concerns.

Senator **Thurmond**. I think it is very public-spirited of you to accept this position if you really feel that is the best thing for the country, and I am sure that is the reason you are taking it.

Again, I congratulate you, and I will be glad to support your nomination.

Judge **Starr**. Thank you, Senator.

The **Chairman**. Senator Heflin.

OPENING STATEMENT OF SENATOR HEFLIN

Senator **Heflin**. Mr. Chairman, today the Judiciary Committee will consider the nomination of Kenneth W. Starr for the position of Solicitor General of the United States. Under the Constitution, the Senate is charged with the responsibility to advise and consent to Presidential nominees to the executive department. This is a crucial task when one considers the enormous responsibility vested in the position of Solicitor General.

When Congress created the position of Solicitor General in 1870, the qualifications were simply stated in the original statute: "An officer, learned in the law, to assist the Attorney General in the performance of his duties." In essence, the Solicitor General is the Federal Government's lawyer. Specifically, he or she determines which cases involving Federal agencies and departments may be appealed to the Circuit Courts and the Supreme Court.

Furthermore, the Solicitor General is the attorney for the executive branch, and, as such, he may select cases which will serve as a vehicle for the furtherance of the administration's goals.

Perhaps the most significant responsibility of the Solicitor General is his access to the Supreme Court and the ability to bring issues before the Court as amicus curiae on important constitutional issues. As the most frequent litigator before the Court, the Solicitor General can considerably affect the development of the law. Because of the unique nature of this office, the Solicitor General must balance the role as advocate for the United States, with the more institutional role of protector of public interest and preserver of fundamental rights embodied in the Constitution. With such valuable principles on the line, this is no small assignment.

I will not repeat the qualifications that have already been recited concerning your background, but there is no question that you are well qualified, and no one questions your legal qualifications. But the confirmation process realistically accords us, as Members of the Senate, the only opportunity to understand how you perceive the role of Solicitor General.

Judge Starr, you will be the envy of many within the legal profession, but with such prestige and power comes the corresponding responsibility to jealously guard the prestige of the office, and to realize that your access to the Court is not only an opportunity but an obligation.

I congratulate you on your nomination, and, if confirmed by the Senate, I wish you the best of luck as Solicitor General.

Judge **STARR**. Thank you.

The **CHAIRMAN**. Thank you, Senator.

Senator Specter.

OPENING STATEMENT OF SENATOR SPECTER

Senator **SPECTER**. Thank you, Mr. Chairman.

Judge Starr, I join my colleagues in welcoming you here again. Just a few years ago, 6 years now, you appeared here for your confirmation process for the Court of Appeals for the District of Columbia Circuit, and your progress has been remarkable. I join those in complimenting you on it, back here for Solicitor General at the age of 42.

I thank you for the so-called courtesy call which we had earlier today. The questions will be varied. One of the obvious questions is why do you want to be Solicitor General, leaving a lifetime appointment, as Senator Thurmond pointed out, for a lower salary? I know the answer because you answered it for me earlier today. It may be that if you return to the private practice of law you can earn more than you will as Solicitor General, perhaps even more than you do as a circuit judge. Perhaps even some of those on this panel could earn more in the practice of law than we do in the U.S. Senate.

There has been the speculation that there might be a different interest, perhaps a seat on the Supreme Court of the United States, and someone may ask you the question if there is any such arrangement. I did earlier today, and I know the answer. But I will not preempt that bit of information.

This hearing poses a very useful opportunity, Judge Starr, to make some inquiries as you see the job of Solicitor General on the line of independence. I join with my colleagues who have already commented about the importance of independence. Many do not understand the independence of the Attorney General of the United States even from his appointor, the President of the United

States. I think it is important to have that understanding, and the context of this hearing is a good occasion for the independence that the Solicitor General has of a sort from the Attorney General of the United States—although, by statute, as you pointed out to me earlier today, you are subservient in a basic sense because you are to be his assistant.

This hearing also presents a good opportunity to revisit some of the really difficult questions which this Judiciary Committee has had in my tenure here, where we have had the nomination processes of a number of those up for Justice of the Supreme Court of the United States, Justice O'Connor, Chief Justice Rehnquist, and Justice Scalia and Judge Bork and Justice Kennedy in terms of what is the appropriate line of inquiry. As Solicitor General, you will face many of those same considerations in the definition of your role.

When you and I talked earlier today, I was impressed about a number of your attributes, but one especially, as you put it, you preferred not to opine, a line of restraint that you have been practicing for the past 6 years, a line of restraint which those on this side of the panel do not practice very often. Our jobs call on us to opine and state an opinion on just about everything, on many occasions even before we are asked, or certainly before we have to. I think that is something of importance, the propriety of asking specific questions on the abortion issue where I think it is not appropriate to ask a nominee. You raise some latitude as to whether it ought to be asked. Others on supremacy of the Supreme Court, *Marbury* v. *Madison* or integration, doing away with segregation, *Brown* v. *Board of Education* where I think those are rock-bed principles. If a nominee is not committed to the supremacy of the Supreme Court on interpreting the Constitution or committed to the principle of desegregation, then I think it raises a disqualification in terms of ability to serve in accordance with the traditions of the Constitution.

So I look forward to the hearing, and I thank you for your participation, and I thank you for taking the appointment.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Grassley.

OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Thank you, Mr. Chairman.

I want to make special note of thanks to the chairman for scheduling this hearing but, more importantly, moving forward now, as we are about to consider a number of important positions, not only in the Justice Department but also in the judicial branch of Government.

I also want to add my words of congratulations and also welcome to the nominee and his family. As has been noted already this morning, the Solicitor General is responsible for conducting and supervising all aspects of Government litigation in the Supreme Court. In addition, the Solicitor General reviews every case involving lower court decisions against the United States to determine whether an appeal is appropriate or whether the Government should file a brief as friend of the Court.

When Congress created the Justice Department in 1870, it provided that the Solicitor General's post be created for the purpose of centralizing control of Federal litigation. The sole statutory requirement for the office is that the holder be learned in the law. The chairman already made reference to that.

Now, to be sure, the Solicitor General is not a neutral. He is an advocate on behalf of the Government. Now, counterbalanced, as has been often noted, are the words carved above the door of the Attorney General's office, already referred to by the chairman, which read, "The United States wins its point whenever justice is done its citizens in the courts."

Former Solicitor General Robert Bork put it in a slightly different way, equally correct from my point of view, and I quote him: "The Court and its functions under our Constitution are far more important than a Government victory in any case."

Though the Solicitor General is often referred to as the tenth Justice, it is important for us to keep in mind that the holder of this post serves at the pleasure of the President of the United States. By Constitution and statute, he owes his allegiance to the executive branch. As an officer of the executive branch, the Solicitor General exercises authority only as delegated by the Attorney General. Thus, the Senate's advice and consent role here must necessarily be more circumscribed than it would be for a lifetime judicial appointment.

Fortunately, Judge Starr is fit to be confirmed by the Senate under any standard. He is, indeed, learned in the law. His experience as counselor to the Attorney General and for more than 5 years on one of the most important appellate courts in the Nation, perhaps second only to the Supreme Court, will serve him well as he goes about his new duties.

In his opinions from the bench, his other legal writings and speeches, he demonstrates a deep and scholarly understanding of the judicial function in a democratic society. He is a most articulate lawyer whose thoughtful demeanor will enable him to serve the Supreme Court, the President, and the public very well.

What I am trying to say, Mr. Chairman, is that I am impressed by this nomination, as I am sure most of the people this morning have already said. So I look forward to Judge Starr's approval by this committee and the entire Senate. Thank you.

The **Chairman**. Thank you very much.

Thank you for your patience and forbearance, Judge. Now, do you have an opening statement?

TESTIMONY OF HON. KENNETH WINSTON STARR, TO BE SOLICITOR GENERAL OF THE UNITED STATES

Judge **Starr**. Yes, very briefly, if I may, Mr. Chairman and the members of the committee. It is, indeed, a high honor to be before you as the President's nominee for the position of Solicitor General of the United States.

As has been noted, the office of the Solicitor General is a unique law office of great distinction. Its work, as the members and the chairman have noted, is of vital interest not only to the executive branch, of which it is a part, but also to the Supreme Court of the United States, and, indeed, to the entire Federal judicial system.

As this distinguished committee goes about its constitutional duties, I would be sorely remiss in not taking note of the great honor bestowed upon me almost 6 years ago when I was privileged to enter judicial service, as has been noted. I came on the Court of Appeals in 1983, joining a bench graced by judges of vast experience and abundant wisdom. My chief judge at the time, Judge Spottswood Robinson III, continues to serve on our court and the Nation with great distinction. So, too, my able chief judge, Judge Patricia Wald, and all the other judges of such high ability who are now in active service on that court.

I am especially mindful today of those who are no longer actively on our bench, claimed by death or illness or called to some other form of service or activity. And with the chairman's indulgence and the committee's indulgence, I would like to note very briefly for the record the immeasurable gratitude that I have to those with whom I have been privileged to serve: Judge David Basilon, Judge J. Skelly Wright, Judge Carl McGowan, Judge Edward Tamm, Judge Roger Robb, Judge Malcolm Wilkey, Judge Robert Bork, and Judge Antonin Scalia. I would also be remiss in not mentioning my esteemed colleague, senior Judge George McKinnon, now recovering from surgery. And, Mr. Chairman, I am especially pleased and honored by the presence here today of Mrs. Wright, Mrs. McGowan, and Mrs. Tamm.

The CHAIRMAN. Welcome, ladies. Thank you for taking the time to come.

Judge STARR. Mr. Chairman, one of our Nation's greatest judges who was privileged to serve at a very tender age, the age of 32, as Solicitor General once said, "I love judges and I love courts. They are my ideals that typify on earth what we shall meet hereafter in heaven under a just God." In the same spirit of Chief Justice William Howard Taft, I thank the committee for permitting me to salute each of my judicial colleagues, past and present, for their contributions to the ideal of equal justice under law and for the many lessons that they have taught me along the way.

If this committee in the Senate should see fit to confirm me, I shall try my utmost to live up to the noble standards that they, by their lives, have set before me.

Thank you, Mr. Chairman. I look forward to the committee's questions.

The CHAIRMAN. Thank you.

We will begin with a first round of questioning limited to 20 minutes to each member. So you can all plan accordingly your schedules.

Senator GRASSLEY. Mr. Chairman, would you say what you are going to do during the period? I have to leave at 12:00, and we have a back-to-back vote.

The CHAIRMAN. Yes. I would try to go until probably about 20 minutes of, so the first 10 minutes we would use of the first vote, and try to resume—if we can have an overlap, try to resume closer to 10 of so that we can have someone here to only use up ten minutes instead of that whole half-hour, if it is possible.

Judge Starr, as I mentioned in my opening remarks, the Solicitor General is called upon to play two related but sometimes conflicting roles, as I characterized it—as characterized by others—one as a quasi-judicial role and the other as an advocate on behalf of the administration. Rather than ask you some general questions, which I will submit for the record, in the interest of time I would like to go to a specific point.

Do you believe that the Solicitor General should be a foremost promoter of the policies of the President before the Court, as one commentator has urged? Or do you believe or do you think that he should attempt to minimize, if not eliminate, the influence of politics and partisan ideology as others have suggested?

Judge STARR. Well, I think the Solicitor General, Mr. Chairman, must be true to the rule of law. He is a law officer. He is sworn to uphold the Constitution of the United States. That has to be the Solicitor General's ultimate loyalty.

He certainly is an official, as has been noted, of the executive branch. The Congress of the United States, in creating that office in 1870, saw fit not to create a truly independent actor but, rather, an officer of the Department of Justice, and who, in fact, serves at the pleasure of the President. But just as the conduct of the entire affairs of the Department of Justice must be independent in the sense of nonpartisan and governed by fidelity to the Constitution and the rule of law, I think that responsibility is particularly heavy and pertinent to the Solicitor General by virtue of his obligation to the Supreme Court—a unique obligation, as has been noted.

The CHAIRMAN. Should you be confirmed, Judge Starr, what would you do if, in a case before the Supreme Court, you personally concluded that the outcome the President hoped for as a matter of policy simply was not legally defensible?

Judge STARR. I would not, in fact, take a position as Solicitor General that I did not feel in my heart, in my conscience was legally defensible. And the specific act that I would take in that situation—which I find, frankly, difficult to imagine, but I appreciate the committee's interest and concern about that—I simply would not, in fact, sign a brief which I found to be indefensible.

The CHAIRMAN. That is good to hear. I ask at this point unanimous consent that additional questions on that issue be submitted at this time for the judge to answer before we vote.

With regard to the issue that I raised about precedent, as my distinguished colleague from Pennsylvania pointed out, you indicated that in the past you did not think you should have an opinion on every issue as a judge, but that we, in fact, tend to. That is both our constitutional requirement, you as a, to use your phrase—which I thought was one of the most graphic and, I think, concise manners in which to state the issue. I think you said at one point in your hearing or in a speech—I am not sure which it was, help me out—that Yukon expression, unless you are the lead dog. How does that go?

Judge STARR. Unless you are the lead dog, the scenery never changes.

The CHAIRMAN. That is right.

Judge STARR. It is an expression from the Yukon Territory where they travel around by dog sled in the wintertime.

The CHAIRMAN. And as you know better than most of us, circuit court and district court judges are not lead dogs, and they do not have the constitutional right or ability to change the law. And I suspect that is one of the reasons why you have held the position, the stated position you have, thus far.

One of the most fundamental doctrines in our Anglo jurisprudence is stare decisis. It is a principle that counsels respect for precedent, and it is a principle that must be both firm and flexible—firm enough so that there is stability in the law, yet flexible enough so that errors in decisions can be corrected.

As you have acknowledged in several of your speeches, you have been duty-bound as an appellate court judge to follow these decisions. If you are confirmed, Judge Starr, to use your other analogy, the scenery will surely change. You will have the discretion to ask the Court to reverse or modify previous decisions, and you will be freed, in a way, of the duty to follow Supreme Court precedent that has so bound your decisions as a circuit court judge.

Now, what are the standards and principles to which you would look to for determining when it is appropriate for the Solicitor General to urge the Supreme Court to overturn one of its prior decisions?

Judge STARR. Well, may I say at the outset that I quite agree that the principle of stare decisis is vitally important. Stability in the law is a very important feature. The larger, the more vast, the more heterogeneous the society, the greater the need, it seems to me, for stability in the law.

But as this committee well appreciates, the issues that arise in constitutional law are, indeed, unique. And the Supreme Court itself has said that it stands ready to reconsider its precedents on various issues of constitutional law. And that is a healthy thing for our legal system. The legal system should not ossify, particularly with issues as important as those that the Court decides.

But, even so, it seems to me, Mr. Chairman, the direct response, is that the Solicitor General should exercise great prudence and caution in the way in which he conducts the legal affairs of that office. He must be sensitive to the views of the Court that are obviously in place. He must be mindful of those views in determining what position the Government should take. He must be respectful. At the same time, it is entirely appropriate, in my judgment, for the Solicitor General, once he is convinced that a decision rendered by the Supreme Court is wrong—is simply wrong in his considered judgment—then it is, it seems to me, appropriate for the Solicitor General to argue in an appropriate case that the Court should reconsider that judgment, just as the office of the Solicitor General urged in *Brown* v. *Board of Education* the Supreme Court of the United States to overrule *Plessy* v. *Ferguson*. That is entirely proper and in keeping, I believe, with the finest traditions of the office.

The key fact, it seems to me, is the professional judgment of the Solicitor General as to whether the issue is one of importance, and whether the Supreme Court in his considered judgment was wrong.

The CHAIRMAN. What about the circumstance in which all the legally respectable arguments to the Court had been made and rejected in a previous case in the near term, not literally the previous term, but within the recent past? Should the Solicitor General revisit some or all of those arguments again and ask the Court to reverse its decision?

Judge STARR. Ordinarily not.

The CHAIRMAN. You have raised, I think—and please correct me if I am wrong. I have read so much of what you have written, and I may damn you here, but I am impressed with your speeches and what you have written.

Judge STARR. Thank you.

The CHAIRMAN. But I believe you have used the phrase "the settled fabric of the law" as one of the indicia that the Supreme Court should consider. My question is whether or not that notion of the "settled fabric of the law" comes into play at all as Solicitor General in terms of what you would be inclined to seek to overrule or change.

Judge STARR. I quite agree. It would; it should. It should not be decisive. An example that springs to my mind is a case decided in the late 19th century interpreting the 11th amendment, *Hans* v. *Louisiana,* and Justice Brennan came to the view, the considered view, a view that I respect, about 10 years ago that that decision was wrongly decided, and he has continued to dissent from decisions of the Court interpreting the 11th amendment.

But if, in fact, a decision is in the settled fabric of the law, that is a powerful factor counseling restraint on the part of any advocate, and particularly the Solicitor General, in going forward. It is not decisive, but it is a very powerful factor.

The CHAIRMAN. In the interest of letting my colleagues have their opportunity and getting to some areas I want to get to, I will ask unanimous consent that additional questions on that issue that I have prepared by submitted in writing. Without objection, they will be submitted, and I ask you to respond in the event we do not get a second or third round of questioning here.

Let me move on to an area which is no surprise to you. You have spoken to it, and it is no surprise to anyone in the press who covers this or my colleagues. And I must acknowledge it is an interest of mine, and that is the liberty clause and the unenumerated rights debate that has—well, it has been going off and on for the past 200 or more years.

Judge STARR. Yes.

The CHAIRMAN. Judge Starr, one of the core themes in your speeches and articles is the relationship between the individual and the State, at least the speeches that I read. I think we have all of your major speeches.

Judge STARR. I think you do. We did our very best to cull our files. I did not have a complete compendium of all speeches, but we think that we have supplied them all.

The CHAIRMAN. We appreciate your cooperation in that matter. I wholeheartedly agree with what I view to be your assessment that many of the key constitutional decisions of this century have been informed by, in your words, "an anti-statist impulse"; and that we have witnessed, in your words, a "60-year voyage in constitutional law that has marked victory after victory for the forces of liberty against the forces of the State." This voyage has helped establish, as you describe in your Stanford speech in March 1988, a "substantial consensus on basic principles."

You said that, "First and foremost of these principles is that liberty is seen as inherent in the individual. Liberty does not derive from the Government. In the immortal words of Jefferson, the individual is endowed by his Creator with inalienable rights."

Do you personally agree with that substantial consensus, to use your words, that has developed?

Judge STARR. I believe in that as fervently as I believe in anything. I believe liberty is inherent in the individual, and I believe Jefferson's immortal words captured exactly what I would hope to convey.

The CHAIRMAN. For the benefit of my colleagues, the reason I asked the question is not that I doubted your belief, but because your speech did not explicitly state whether or not it was your belief. You were being more of a commentator than you were expressing your own personal views, and I wanted to have that on the record.

In addition to identifying this substantial consensus, you have also noted that there has not been a, quote, "counter-revolution to stem the tide of constitutional doctrine that has favored the forces of liberty over the forces of the State," end quote, a phrase you used in your 1988 Oklahoma Law Review article.

And although there are those who believe strongly, as we know—and I respect their views—that there should be a counter-revolution, it is one of the basic philosophic and jurisprudential arguments that is taking place again, and it will again and again and again throughout our history, as almost irresolvable.

Should such a counter-revolution ever begin or gain consensus or gain real momentum, do you think that it should play a role in, or have any impact on your leadership of the Solicitor General's office?

Judge STARR. Well, absolutely. It seems to me that it is entirely appropriate—in fact, it is a duty of that law office to be mindful of developments in the law, to have a loyalty to the law, to try to assist in the development of legal doctrine.

And if I felt that there was an area of constitutional law that, in my considered judgment, informed by the views of others in the office and elsewhere, was going badly awry, I would, in fact, seek an appropriate opportunity in an appropriate case to make those views known.

The CHAIRMAN. As I understand from your article, you indicate this counter-revolution to stem the tide of the constitutional doctrine that has favored the forces of liberty over the forces of the State—an argument that you have answered, as I understand your earlier answer—one that you favor, this consensus of the last 60 years; that this counter-revolution, were it to occur—and I am using the phrase "counter-revolution" because that is the phrase used in the article—it is not one that you—let me put it another way. Are you one of the counter-revolutionaries?

Judge STARR. I don't think I am a revolutionary or a counter-revolutionary. I am pretty traditionalist.

The **Chairman**. But let me again be specific. Going back to the last question, because maybe I misunderstood, the last two answers seem to me to conflict, and it is probably my lack of understanding.

You indicated that this 60-year voyage of constitutional law has marked victory after victory for the forces of liberty against the forces of the State, and you go on to quote Jefferson in that context.

Judge **Starr**. Yes.

The **Chairman**. And you then answered me—I thought you said that you believe something to the effect, with every fiber in your being, or wholeheartedly, or deeply, that that constitutional voyage is one that should have been taken and that you subscribe to, is that correct?

Judge **Starr**. That is correct.

The **Chairman**. Okay, all right. Now, I understand your second answer.

Now, is there any doubt in your mind—let me strike that, please, because that would be repetitious.

Judge Starr, in your speech entitled "Liberty and Privacy: Some Modest Reflections," you spoke of the jurisprudence of Justice Harlan and the fact that his opinion often, in your words, and I quote, "called forth an ancient tradition in our law," end of quote.

That tradition, you said, and I quote, "is that Americans do, in fact, enjoy rights not enumerated in the Constitution," and that "the liberty of the people enshrined in the 14th amendment does not necessarily include all those rights enumerated in the Bill of Rights."

You continued on, saying that this tradition invoked the circumstances surrounding the very framing of our Government, a tradition, again, in your words, that, quote, "certain rights were expressly enumerated by the framers along with the clearest stated intent by the founding architects that the catalog of rights enumerated in the first eight amendments were not to be exclusive. That intent was made manifest in one of the original amendments themselves, the now remembered ninth amendment," end of quote.

I assume your phrase "now remembered" was in reference to the previous and only real exposition I have read, "The Forgotten Ninth amendment."

Judge **Starr**. Yes.

The **Chairman**. As Solicitor General, do you see yourself standing within and affirming those broad traditions that you described in your speeches?

Judge **Starr**. Yes. Those are certainly my views that are shaped not only by political philosophy and the reading carefully of the Declaration of Independence, but also the discussions at the original Congress, the first Congress that convened in New York.

And the debate, I thought, was very clear to the extent that the annals of Congress can, in fact, be relied upon as authoritative, that Madison and the other framers of the Bill of Rights were very keenly mindful that there were other liberties, ancient liberties of the people protected by the common law, and that the enumeration of the specific rights identified in the first eight amendments of the Bill of Rights were not meant to be exclusive, and that was the function of the ninth amendment.

The CHAIRMAN. I was also impressed by your—you seem to be—and I don't expect you to respond to this—you seem to be very much out of the mold of Justice Powell in the sense that you indicate that the Liberty Clause, as informed by the ninth amendment, to the extent that it is, is not unlimited, and that it seems to be required—it is itself informed by societal values. I believe that is a phrase you have used.

And in that context—and this is my last question because my time is about up—there are legitimate concerns—you have expressed them; I believe I have and I believe others have who share the view that there are unenumerated rights in the Constitution—legitimate concerns about the possibility that judges might not submerge their personal preferences.

The real question for many people, however, is not whether they have these concerns, but the conclusions that are drawn from that concern. Justice Powell, for example, said that these concerns do not counsel abandonment of a broad reading of liberty, but instead counsel caution and restraint.

Your speeches seem to suggest that you, too, share that belief, a belief that while the courts must exercise caution, the history of our Nation and the jurisprudence of the court support giving substantive content to the due process clause of the 5th and 14th amendment.

Is that a fair reading on my part of your view?

Judge STARR. Yes. I believe that the liberty clause of the 14th amendment and of the fifth amendment has substantive content, and that that liberty is, in fact, protectable.

My favorite example is the early case from this century of *Pierce* v. *Society of Sisters*—the right to educate one's children and the rather strange action by the Oregon Legislature, in effect, abolishing the parochial schools.

Nowhere in the Bill of Rights will one read anything with respect to the education of one's children, and yet the court found that that interest was a substantive liberty interest. I think that was exactly right.

The CHAIRMAN. You also make a comparison—and I will stop with this—you also make a comparison, and I think I have read it properly, between the *Dronenburg* case and the famous *Connecticut* case, which all of America seemed to become aware of, the *Griswold* case.

And parenthetically I might note I think you read exactly why there was the reaction there was publicly, particularly in the South, which is another issue, as to why the issue of privacy became an issue of primacy in that debate.

But you indicate that the reason why the court was legitimately involved in acknowledging the unenumerated right of privacy as it relates to consensual relationships between married couples relating to procreation—that it was also legitimate for the court to make a judgment that was different regarding consensual relationships in terms of homosexual activity.

And the distinction you made, if I am not mistaken, relates to settled and accepted societal values reflected by the court. Am I incorrect or correct?

Judge **Starr**. Correct, reflected by law, in what Justice Cardozo put so beautifully, the authentic forms of justice through which the community speaks. It is not a Gallup poll. It is, rather, the statutes, the constitutions of the several States, and the judicial decisions which provide the principled judge, the restrained judge, with guidance in determining what kinds of relationships do, in fact, enjoy the constitutional sanction and protection in the Liberty Clause.

And if I may just say another word——

The **Chairman**. Please do.

Judge **Starr**. The marital relationship—and I thought it was very well put by the Justices in *Griswold* in the majority—has been protected from time immemorial by the law. It is the law that protects these relationships, and that, it seemed to me, was the distinction the court was thereafter drawing in *Bowers* v. *Hardwick*, the Georgia anti-sodomy statute case, saying that that kind of relationship and activity had simply not enjoyed sanction, not in Gallup polls, but in the law, and it was to the law that the judges would look in providing content to the concept of liberty.

The **Chairman**. I will come back to it, but Cardozo had a view, as you well know, of jural postulates, and he made the analogy between jural postulates and cumulus clouds. He said that every society, every generation, watches certain large clouds, fluffy clouds, pass out of sight and others come into view, and it is a gradual process and the law must reflect that in terms of recognizing unenumerated rights.

But my colleague from South Carolina has heard enough about clouds and he is anxious, and understandably, to have his turn. I thank you, Senator, and I yield to the Senator from South Carolina.

Senator **Thurmond**. Thank you, Mr. Chairman.

Judge Starr, we have a vote in the Senate in about seven minutes, so I will just try to take about five minutes. Speaking of the Constitutional Convention, and so forth, really, there were two big questions that caused great controversy there.

One was how the legislature body would be made up. Virginia was the biggest State and their representatives favored basing it on population. New Jersey was the smallest State and they favored basing it on giving each State the same.

Roger Sherman of Rhode Island came up with the great compromise, it was called. He said let us establish two bodies instead of one, give all the States the same, two Senators, and then base the House on population, and that is what was settled.

The other big question before the Constitutional Convention was just what powers it would give to the Union. Patrick Henry opposed the Constitution because he said sooner or later, it would gobble up the rights of the States, and many people opposed it for that reason. It looked like they were going to have a difficult time getting a constitution for those two problems I just spoke about.

But article I, section 8, of the Constitution provides chiefly the powers of the Union, and then it was difficult as to whether they would be able to adopt it and they had the promise of the delegates that they would come up with a Bill of Rights, which was finally adopted in 1791.

The 10th amendment to the Constitution and the Bill of Rights provided all powers not specifically delegated to the Union are reserved to the States. We haven't followed that down through the years. The Federal Government has gone into almost every facet of people's lives.

Now, if they want to do that, they really ought to amend the Constitution and not just go into it in violation of the Constitution.

I don't know whether you have thought very much about that subject or not, but I presume you do believe in the 10th amendment.

Judge STARR. Yes, Senator Thurmond, I certainly do. It is part of the original Bill of Rights. As the Senator is aware, however, the Supreme Court in the *Garcia* case has indicated that issues of federalism in that respect are ultimately political issues to be resolved in the political process.

But I certainly do think that intriguing issues are raised by a number of Federal statutes in the arena that we call, by way of shorthand, preemption, and whether, if Congress does, in fact, see fit to legislate in a particular area, the work and activity of the States are preempted. That, it seems to me, is a very lively, topical, current issue.

And I read the Supreme Court to be saying in that respect that the historic powers of the State must, in fact, be respected. We are not going to loosely or cavalierly imply the preemption of the rightful operation of the States, but if Congress sees fit to do so, it may, in fact, do so under the Supremacy Clause of the U.S. Constitution, which again I think suggests that that issue is itself an issue to be resolved in the democratic branches as opposed to the judicial branch.

Senator THURMOND. In 1948, as you know, I ran for President on the States rights ticket, trying to preserve the rights of the States. As long as we have strong States and don't convey all the power to Washington—there is only so much power.

Now, are you going to leave it with the States and the people where the Constitution put it, or take it to Washington? I became so concerned over this that I did run for President on that basis.

Now, I am thoroughly of the opinion that we can avoid a dictatorship ever arising in this country if we don't convey all this power to one place, the central government. As long as we have 50 strong States, we won't have a dictator. But I think we have got to preserve the Constitution as our wise forefathers wrote it, and we ought to adhere to it and I think the judges ought to adhere to it, and they haven't done it always. So I just wanted to call that to your attention.

I have some more questions here, but I have got to go. We are going to have a vote in just a few minutes, if you will just answer these for the record.

Judge STARR. Thank you.

The CHAIRMAN. Without objection, they will be placed in the record.

Senator THURMOND. Thank you, Mr. Chairman.

[The questions of Senator Thurmond and responses follow:]

WRITTEN QUESTIONS FROM SENATOR THURMOND

QUESTION 1

Judge Starr, you have served as a judge for the U.S. Court of Appeals for the District of Columbia Circuit since 1983. That is a position with lifetime tenure, and has been described by some as the second most important court in the country. Would you please tell the committee wny you made the decision to leave the federal bench in order to assume the responsibilities of the Solicitor General?

ANSWER

I was asked to serve. The Solicitor General is entrusted with the important task of representing the interests of the United States while promoting the principled evolution of legal doctrine. My decision to accept the President's nomination was greatly influenced by the pivotal importance of that Office and its distinguished tradition of exemplary legal craftmanship. As you well point out, however, my current position on the Court of Appeals likewise involves challenging and important work. The decision to accept the President's nomination was, therefore, by no means an easy one. If confirmed, I shall very much miss the work of this court and carrying on the high calling of a judge.

QUESTION 2

Judge Starr, if you are confirmed as the Solicitor General you will be required to present arguments before the Supreme Court. There have been some who have expressed concern over the fact that you have never argued a case before that court. How do you respond to this concern?

ANSWER

There would be few nominated to fulfill the important duties thrust upon the Solicitor General who would not question some aspect of their own qualifications, but the varied aspects of my legal career provide some comfort.

I have now served as a judge on the United States Court of Appeals for nearly six years. Each case provides the courtroom exchange that molds the effective advocate. Additionally, the two years during which I was privileged to serve as a law clerk to Chief Justice Warren Burger have given me a helpful insight into and perspective about what constitutes a successful Supreme Court argument. In addition, my years of service in the Justice Department heightened that understanding of effective advocacy.

My years of legal practice as a litigator in a large, California-based law firm -- first as an associate and then (for a brief period) as a partner -- provide me with additional training.

As I reflect upon the distinguished advocates who served as Solicitor General, two come to mind when the question of experience arises. In his first argument before the Supreme Court, Lee Rankin, then Assistant Attorney General, acquitted himself with great distinction when he argued the Government's case in *Brown v. Board of Education*. William Howard Taft, before distinguishing himself as President of the United States and Chief Justice of the Supreme Court, argued his first case before the Supreme Court only after he had been appointed as Solicitor General. If confirmed, I would look to these men, among others, as models for the performance of the Solicitor General's duties.

QUESTION 3

Judge Starr, one of the responsibilities of the Solicitor General will be to determine what cases to ask the Supreme Court to review. Have you given any thought as to how you will make these important decisions?

ANSWER

Several factors must guide the Solicitor General's decision to ask the Supreme Court to accept a particular case for argument and decision. The significance of the legal issue is a primary concern. That significance may emerge in the effect that a lower court's decision will have on the justice system, the nation's economy, or any other area of importance to the Nation. That significance may also lie in how the case will alter the legal system's understanding of an important area of statutory or constitutional law. A second set of issues that guide requests for review falls under the rubric of the orderly development of the law. When a case embodies one side of conflicting positions held by U.S. Courts of Appeals representing different circuits, it often merits review by the Supreme Court. Similarly, when a case presents the opportunity for the Supreme Court to clarify a difficult or confused area of statutory or constitutional law, it may merit Supreme Court consideration. Additionally, while weighing these concerns the Solicitor General must always be mindful of the Supreme Court's caseload and the programmatic concerns of the Executive Branch.

QUESTION 4

Judge Starr, during the course of the committee's hearings on nominations to the federal bench I often ask a nominee his view on the importance of *stare decisis* in constitutional law. You have served as an appellate court judge for more than five years. Based on this experience, would you give me your opinion as to the importance of the doctrine of *stare decisis* in constitutional law?

ANSWER

Stare decisis, the practice of adhering to past precedent, safeguards two key attributes of the rule of law, namely, consistency and fairness. The time-honored rule of *stare decisis* has always, however, been tempered by the need for error correction and the full development of the law. The balance between these competing concerns in any particular case must ultimately be a matter of judgment, but the values of consistency and fairness are paramount.

The Supreme Court has wisely indicated that *stare decisis* is a less weighty factor in constitutional law decisions. The primary reason is, of course, that in our system of constitutional supremacy legislatures cannot overturn constitutional decisions. Courts therefore have a special duty to be open-minded and willing to revisit what may appear to be well-settled constitutional doctrine. *Brown v. Board of Education* provides the classic example of this important quality of openness to arguments that existing precedent may, upon reflection, be unfaithful to constitutional commands. Nonetheless, *stare decisis* retains significance in constitutional law, and departures from constitutional precedent require careful attention to the underlying values of consistency and predictability.

QUESTION 5

Judge Starr, how do you intend to resolve a conflict between your own conscience or your own sense of justice and the position you are taking on behalf of the government in a particular case?

ANSWER

If confirmed, I would be charged with the obligation of advocating the interests of the United States while at the same time providing the Court with candid and forthright guidance on how best to analyze the legal issue at hand. In fulfilling this dual role, I see relatively little possibility for a deep conflict between my own views and the position of the United States in any particular case. But it certainly could happen. Indeed, a conflict would exist if I were asked to take a position before the Supreme Court that I believed to be legally indefensible. In that situation, as I indicated in my testimony, I would simply not sign the brief on behalf of the government. In all cases, I would be committed to representing the interests of the United States within the bounds of scrupulous advocacy, complete candor, and applicable legal principles; positions pressed by the United States are, I believe, quite unlikely to threaten to take the Solicitor General outside of these bounds.

The CHAIRMAN. Judge Starr, what I will do—since we have the time, I will move to the second round of questioning that I have, unless one of my colleagues comes back, and maybe get another few minutes of questioning in, if I may, so that you will be relieved of the requirement of waiting much longer for the ice cream cone. [Laughter.]

Judge Starr, one of the most important responsibilities of the Solicitor General is the filing of friend-of-the-court briefs, a brief filed by the Federal Government in cases in which the Government is not actually a party.

These briefs, like those filed in cases in which the Government is a party, have considerable influence on the Court. It is in this area that the Solicitor General truly, in my view, has the most discretion.

The number of friend-of-the-court briefs filed by the Solicitor General has varied over time. For example, according to statistics compiled by Lincoln Kaplan in his book, "The Tenth Justice," the number of such briefs during the 1960's and 1970's averaged about 20 to 30 percent of the total number of filings by the Solicitor General. During the Reagan administration, the number increased to between 40 and 50 percent of the Government's total filings with the Court.

Judge Starr, should you be confirmed, what standards do you expect to follow in filing friend-of-the-court briefs?

Judge STARR. Well, the ultimate test is whether the Justice Department, the Solicitor General, can, in fact, be helpful to the Court in the development of the law. The SG cannot, in my judgment, be a disembodied voice.

Dean Griswold put it very well in one of his comments, and I think Judge McCree said something quite similar, that the Solicitor General was not a roving ombudsman to opine loosely on any area of law of interest to him. I think that is quite right.

There, of course, are a number of situations in which, Mr. Chairman, the Court invites the views of the Solicitor General, and my view in that respect would be that if my views were invited, I would comply with that invitation, and that accounts for a substantial percentage; I don't know what.

But where the Court has not, in fact, invited the views of the Solicitor General, I think prudence and caution are in order. There are issues, obviously, of great moment; *Brown* v. *Board of Education* springs to mind as an issue that was certainly appropriate.

Even though the Federal Government was not directly involved with that specific litigation, the issue was of such urgency to the country, of such constitutional moment, that it was entirely appropriate, it seems to me, for the Solicitor General to make his voice heard.

The CHAIRMAN. I think you have answered the next question, but let me ask it for my clear understanding. You indicated in some of your opinions and speeches that you believe judicial restraint is—the phrase you use is "judicial self-restraint."

Do you believe that there is a comparable doctrine of executive self-restraint?

Judge STARR. Oh, yes. I think that there should be restraint shown by all three branches of Government; that each branch should be respectful of its coordinate branches; that it should be prudent in the exercise of its own rightful powers. And that holds true, in my judgment, for the executive as well as the other two branches.

The CHAIRMAN. Judge Starr, as you probably know, during the past few years the position of counselor to the Solicitor General has been created. To some, that signified the emergence of a so-called political deputy in an office that previously had pretty well been insulated from politics.

I understand that the counselor's position is currently vacant. Am I correct in that regard?

Judge STARR. That is my understanding.

The CHAIRMAN. Should you be confirmed, do you intend to fill that position and, if so, what criteria will you use to identify the right person?

Judge STARR. Yes. In fact, I think it is a very fine position. I was one of those in the Smith Justice Department who was urging upon Solicitor General Lee the creation of such a position.

I have seen firsthand instances where a career deputy who becomes, for whatever reason, the Acting Solicitor General, is put in a truly untenable and unwise situation—cases of particular moment that are simply difficult, if not impossible, for a career civil servant to carry on as effectively.

The CHAIRMAN. Why?

Judge STARR. Because of the nature of the issue at times. Also, for example, the instance, frankly, that was coming to my mind was the Bob Jones situation where the Solicitor General was recused from the case and the Acting Solicitor General was a career civil servant.

I think that is a terrible situation for a career civil servant to have to find himself in on issues, and there will be issues of division and importance in any administration.

The CHAIRMAN. Why is a career civil servant not more insulated? I assume that is what you are moving toward, this idea that there be greater independence. Is that the objective? Is the assumption you are making that a career civil servant would not be able to be as independent because his or her career path is put in jeopardy by such difficulties?

Judge STARR. There are instances, for example, that the office might, in fact, be taking a contrary position to the position that had been advanced in a prior administration. That happens. Positions evolve, positions changed. The law does not calcify.

And in that particular instance, the Acting Solicitor General in that particular case had actually been on—his name had been on the petition for certiorari taking Position A. And then the brief, which was either to bear his name or not, was taking Position Z. That kind of thing, I think, is unfortunate. It is unacceptable for, in my judgment, for a career civil servant to be put in that position.

Now, in terms of the—I think it is a very sensible position to have. I was, as I say, involved in that process and, in fact, was encouraging the late Professor Bator to take that position, which he, in fact, did.

And if it is filled, it should not be filled on the basis of political considerations. It should be, to the contrary, filled with an individual who has superb legal qualifications for the job, who would be, at a minimum, equally qualified with the other distinguished deputies, the career deputies.

I think it is better for the individual to have a more sterling record, a more outstanding record, because I think it also enhances, frankly, the prestige of the office.

The CHAIRMAN. I am a little confused. If you argue for executive restraint as well as judicial restraint, why would it not make more sense to have a career deputy who might very well have taken a different position in an earlier administration be making the decision as to whether or not this departure should take place?

The Bob Jones case, in particular—President Reagan would have been saved a lot of grief, the Nation would have been saved a lot of difficulty, and I think the minority communities in this country would have been more convinced that there was a genuine concern for them than what I thought to be the very tenuous rationale offered by the Solicitor General.

Why should it not be made harder to change institutionally than easier to change?

Judge STARR. Well, again, it is, in fact, a question of judgment. There are many instances where one should not, in fact, seek to change, but there are, nonetheless, instances that are bound to arise where, in fact, the Solicitor General will want to consider a departure from what the position of the agency or the department has been in the past.

In my judgment, it is—and yet it may be an issue on which the Solicitor General cannot participate, for whatever reason. I think, in short, that it is wise and sound government that when the Solicitor General of the United States cannot, in fact, participate in a matter, that the individual who steps into that person's shoes is a noncareer individual who, in fact, therefore reflects, embodies the views of the appointing authority. I think that is very sensible. I am not suggesting that the individual loses his or her independence by virtue of that.

The CHAIRMAN. Well, my time is up because I have to run to vote quickly, but if you can answer briefly—if not, I will wait until a second round, or a third round in this case—how will the counselor's position differ from that of a Deputy Solicitor General, who traditionally have been of the highest caliber?

Judge STARR. Yes. The non-career deputy, as I understand it—and I was there only during part of the first term—in fact, carries on the same kinds of duties as the other deputies in the office, but that person becomes——

The CHAIRMAN. Why do we need a counselor if we have an incredibly competent Deputy Solicitor General?

Judge STARR. Oh. The individual, at least as I understand the structure thus far, is, in fact, a Deputy Solicitor General. It is simply the creation of a fifth deputy post.

The CHAIRMAN. Yes, but I am saying why do we need a fifth deputy post? For example, in the case of Bob Jones, I mean, you know, there were four or three—I am not sure how many; I guess four—deputies. Why did we need a, quote, "counselor" who has what most of us thought to be—was put in place to provide for more of a political input rather than a substantive input?

Judge STARR. Well, it seems to me that the role that—you are referring to the individual as counselor, and it is by no means sure that that would, in fact, be the title of the individual in this administration.

I frankly have not thought through exactly what the title should be or the precise function should be. I do think as a matter of sound administration—just as every other division of the Department of Justice has a noncareer deputy who is prepared to act as the Assistant Attorney General, it makes perfect sense to me to have the same kind of symmetry and structure, but the individual does, in fact, carry on the duties of a deputy. He or she would argue cases in the Court, and the like.

I apologize.

The CHAIRMAN. No, no. I probably shouldn't have tried to squeeze it in. I must carry out my duties and vote. We will recess until the next member returns, at which time we will resume immediately the questioning, rather than wait for me to come back.

[Recess.]

Senator SPECTER. I have been advised that Senator Biden has requested that I reconvene the hearing. We have finished two votes on the floor on the pending bill on Dr. Martin Luther King's Commission, and I will now begin my round—20 minutes, as the chairman has outlined it.

Judge Starr, I regret that I could not stay for all the intervening hearings. I left while Senator Biden was asking his questions, so there may be some overlap, and if so, I regret it.

During my brief opening statement, I had raised the question of why you wanted to be Solicitor General, and the suggestion which has appeared in the media about the possibility of your being a subsequent nominee to the Supreme Court of the United States. I would like to begin with those subjects.

Why are you willing to give up a lifetime appointment on a very prestigious Federal appellate court to take the job as Solicitor General, operating at the pleasure of a superior and at a lower pay?

Judge STARR. I was asked to serve, Senator. I did not seek the position either directly or indirectly, but I was asked to take on this responsibility. It is a great responsibility, if the Senate sees fit to confirm me. I have the highest regard for the office. It is one of the most important legal jobs in the U.S. Government.

I am dedicated to public service, have enjoyed my tours of duty in public service, and view this as another avenue of public service.

Senator SPECTER. Do you consider the calling for Solicitor General to be a higher calling of public service than a judge on the Court of Appeals for the D.C. Circuit?

Judge STARR. No, I can't say that I consider it higher. It is another form, and there are the obvious losses, some of them profound, that you have identified, including the loss of life tenure on the bench, which the framers of the Constitution so wisely provided for. I sense the importance of that as a judge day in and day out, and I am going to miss the judicial process and my colleagues on the bench if I am confirmed.

Senator SPECTER. Well, Judge Starr, I ask you whether you consider it a higher calling to have some evaluation as to your taking the job over at the D.C. Circuit. When you and I talked about this matter before, I told you of the fascinating account by Chief Justice Warren for those of us who served on the Warren Commission staff back in 1964.

When the Chief Justice convened the Warren Commission staff in his capacity as chairman of the Commission, he recounted the story about his being asked to take on the chairmanship of the Commission, and he said that Solicitor General Archibald Cox had come with a request from the President for him to serve and he had declined.

Then he said that Deputy Attorney General Katzenbach had come with a request and he had declined, and then the President himself asked him to come to the Oval Office and asked Chief Justice Warren if he would decline to put on the uniform of his country in time of national emergency.

The Chief Justice told the group of young lawyers, in the fact of that kind of a request, he could not decline, and he thought it a very high calling. That is why I asked if you think it a higher calling to be the Solicitor General than to retain your current position, or is it a fact of being asked by the Attorney General, speaking for the President, in and of itself a request which you felt you couldn't decline?

Judge STARR. Well, it is certainly a very high calling. It is a different function than the function that I presently carry on. I am reluctant to say that it is a higher calling just because of my profound respect for the Federal bench and all that that means to me. But it certainly is a noble and terribly important calling, and I consider it a great privilege to have the opportunity to serve.

Senator SPECTER. Judge Starr, when we talked earlier, I asked if you thought it would be appropriate to make an inquiry as to any suggestion about a Supreme Court nomination. If no one has asked you that question in the interim in my absence, I think it is an appropriate subject for your response at this time, if you are willing to do so.

Judge STARR. Yes. I am happy to do so. There is no arrangement, no understanding of any kind whatsoever, and indeed no discussion of any such matter at all.

Senator SPECTER. Judge Starr, what do you view as the level of independence, if any, which the Department of Justice has from the President and the level of independence which you would have, if any, in your role as Solicitor General from either the Attorney General of the United States or from the appointing power, the President of the United States?

Judge STARR. Well, the Department of Justice has to be absolutely nonpartisan in its enforcement of the law. It has an obligation, a unique obligation, as its name suggests, to serve the interests of justice. And at times, that may, in fact, mean saying no, emphatically no, to the appointing authority because of our fundamental belief as a people that no one is above the law, and that it is the duty of all the individuals in the executive branch, but particularly a profound duty on the part of those serving in the Department of Justice, and especially the Attorney General——

Senator SPECTER. Judge Starr, what word did you use, nonpartisan?

Judge STARR. Yes, nonpartisan enforcement of the laws; that the law must be obeyed.

Senator SPECTER. Well, that is a little different, though, from independent. Does the President have the authority, in your view, to direct the Attorney General on a judiciary, * * * judiciary, on a function of the Department of Justice?

Judge STARR. I am sorry. On a judiciary, did you say?

Senator SPECTER. Well, no. Does the President have the authority to direct the Attorney General as to what to do on a function of the Department of Justice?

Judge STARR. It depends, I believe, on the function. If it is to take a specific action in the enforcement of the laws, then it seems to me that while the President may have the raw power to do so, it would be wrong to do so, and so in that sense it would be an illegitimate use of power to order the Attorney General or any official of the Department of Justice to take an action that was contrary to law.

I think the President clearly does have ultimate executive responsibility under our system of laws, and at times it is appropriate, entirely appropriate for the President to——

Senator SPECTER. But what do you think——

Judge STARR. Excuse me.

Senator SPECTER. Yes.

Judge STARR. To become involved in a particular matter if it is a matter of great moment.

Senator SPECTER. Well, how would you specify that?

Judge STARR. Well, I think history teaches us that there are times when the President has seen fit to become involved. President Carter became actively involved in the Bakke litigation. I think that is not inappropriate for the President of the United States to be interested and concerned in the position being taken by the executive branch on an issue of great moment.

President Eisenhower, we know from history, personally sat down with the briefs in *Brown* v. *Board of Education* and made substantive changes to the brief. That should be an extraordinary event. It certainly should not be ordinary practice, but the President does, in fact, have that authority.

And, indeed, by virtue of his obligation to uphold and defend the Constitution of the United States, there are times when it seems to me the President could be criticized for not being attentive to such matters.

Senator SPECTER. Well, the instance you cite goes a substantial distance in specifying the authority of the President if that is an appropriate exercise of his power to alter the brief of the Government in a pending case, and you think the President does have that authority?

Judge STARR. Absolutely. It is one, in my judgment, that should be exercised with great caution and with prudence, and there should be every effort to insulate the Solicitor General and his staff. But, ultimately, I think that is appropriate.

Senator SPECTER. In one of your responses to Senator Biden's question—and this was the point where I had to leave this morning—you were commenting that if you felt that the request made violated your view of the Constitution that you would decline to sign the brief. Is that an accurate statement of what you had responded to?

Judge STARR. I believe the chairman's question had to do, if I am recalling correctly, with a legally indefensible position as opposed to simply a disagreement. I think the two are quite distinct.

If I were being asked to take what I thought was a legally indefensible position, I would not sign a brief or make that argument. If I disagreed, if I thought it were not the better view, it is a judgment call, a contextual call. Can I, in fact, make the argument—for example, if it involves the constitutionality of a statute passed by Congress, if I personally felt that the statute were unconstitutional, it would be a very difficult decision for me to, in fact, do my duty, which is to defend that statute, if I can, in conscience, defend it.

So it becomes a matter ultimately of a combination, difficult to articulate, but nonetheless one that I know that you will understand, of professional judgment and conscience. There might, in fact, be instances where I simply could not, in conscience, take a particular position even if I felt a colorable argument could be made.

But the clearest case, in my judgment, is where I am being asked to take—and I cannot imagine this being the case; I truly cannot. But, in theory, if I were asked to take a position that I thought were utterly fatuous and without legal foundation, I would decline to take that position and the chips would fall where they may.

Senator SPECTER. Well, I don't know if this will clarify, but let me proceed with one further question on this line. Suppose the constitutionality of a statute was to be before the Supreme Court and you thought that if you were a judge, you would rule it unconstitutional, but that there was a good argument to be made on constitutionality; that it was a close question.

And your superiors, either the Attorney General or the President, wanted you to argue to uphold the constitutionality.

Judge STARR. To uphold?

Senator SPECTER. To uphold, in a context where you, if sitting as a judge, would say unconstitutional, but it was a close question and you thought there was a good argument in favor of constitutionality. In that kind of a situation, would you argue to uphold the constitutionality of the statute?

Judge STARR. My inclination would be strongly, yes. That would be my duty, and if I felt that a good argument could be made, then it is my duty to make that argument because the Solicitor General has a quasi-judicial function, but he, in that office, is not a judge and that office is not a judicial office.

So if I felt that a good argument could be made, even if I as a judge would not accept that argument, as a general matter I would be able, and would make that argument, and that would be my duty to make that argument.

Senator SPECTER. Well, we talked at some length before about the quasi-judicial nature of the Solicitor General's office, and that is a term used to apply to district attorneys, a job that I held.

So the dividing line would be whether you thought there was a valid argument to be made, even though you disagreed with the ultimate import of it?

Judge STARR. I think that is part of the equation, but in contrast to a district attorney or U.S. attorney, I think the Solicitor General has a special obligation to the U.S. Supreme Court.

I don't think the Solicitor General should take every good argument to the Supreme Court. I think the Solicitor General should exercise his professional judgment and, in fact, decline to take cases and to take arguments, as well as to try to bring as much consistency to bear in the governmental litigation process as possible.

It is a very untidy process. It is a very unfortunate thing, seemingly inevitable, that the Government, in its litigation positions, takes contrary positions in different cases. It is like the Abraham Lincoln story, and I would want to try to avoid arguing one thing in the morning and arguing another thing in the afternoon. I would want to try to avoid that to the fullest extent possible.

Senator SPECTER. Well, in a sense, Judge Starr—in a significantly different context, but in a sense, a district attorney has a similar consideration to how heavily he will burden the dockets of his own courts. The quasi-judicial discretion enables him to select cases as well, so that there is that consideration of the docket.

Judge STARR. That is quite right. It is the exercise of prosecutorial discretion, and this is the exercise of certiorari discretion, as well as appellate discretion generally.

Senator SPECTER. When you use the example of President Eisenhower modifying the briefs of the Government in the *Brown* v. *Board of Education* case, you have moved to a very rock-bed consideration.

You and I had discussed what would be an appropriate range of questions for somebody who is up for Solicitor General or somebody who is up for a nomination for the Supreme Court of the United States.

I had expressed to you my view that I did not think it appropriate for a Judiciary Committee member to inquire of a nominee for the Supreme Court how he would vote on an effort to overrule *Roe* v. *Wade*, on the ground that that was likely to be a case coming before the Court in a contentious area and one where there ought not be any effort to get a commitment from a nominee. But that if the case involved something as rock-bed as *Marbury* v. *Madison*, the 1803 decision of the Supreme Court of the United States establishing the authority of the Court to be the final arbiter on deciding constitutionality, or if the issue was *Brown* v. *Board of Education*, desegregation and equal protection of the law, that those are two illustrations of cases which are so rock-bed that I think it fair to ask a Supreme Court nominee whether that person would stand by *Marbury* v. *Madison* as something so fundamental that to disagree with it would constitute disqualification, or arguably would constitute disqualification, in the kind of a question to be asked.

Would you agree with that, generally?

Judge STARR. Yes, I do. I can't improve upon that formulation. I think that is—I think the Senate, in its advise and consent power, has wide discretion; it has unlimited discretion. But I think that discretion should be exercised prudently and circumspectly, and it seems to me that the dividing line you have drawn is a very sensible and prudent line.

Senator SPECTER. Do you think the discretion is so broad that Senators may properly vote against a nominee simply because the Senator feels that the President should have submitted a different name; that if the Senator were President, he would have submitted a different name?

Judge STARR. As a matter of raw power conferred upon you by article I and article II in terms of the advise and consent authority, yes, you have that power. Should it be so exercised? I think that is a judgment call, informed by history, and history, I think, would suggest comity, respect for the nominees of the President of the United States, and recognizing that the appointing authority was, in fact, conferred at the founding on the President, with this body given the advise and consent function.

But, again, your discretion is not cabined at all by the language of the Constitution. We would have to look to history for guidance.

Senator SPECTER. Would you say that a Senator has the "raw power?"

Judge STARR. I believe so.

Senator SPECTER. Would it be an appropriate exercise of power, in your judgment?

Judge STARR. In my judgment, no.

Senator SPECTER. But is there a certain comity or a certain deference owed to the Presidential decision to submit a nominee?

Judge STARR. It seems to me that that is in the nature of the harmonious relationships between and among the coordinate branches.

Senator SPECTER. Well, that would be my inclination. Probably, there are cases where Senators have exercised a broader range of discretion, and that is an issue which has been debated extensively. In the 8½ years that I have been here, we have had a wide range of questions for Justice O'Connor, Chief Justice Rehnquist, Justice Scalia, Judge Bork, Justice Kennedy. There have been a wide range of responses, from Justice Scalia, who declined to answer virtually anything, to others who have answered a wide range of questions.

I just have one more line of questions. Then I will defer to my colleague, Senator Grassley, who has come into the room. My 20 minutes are not quite up yet.

If you were asked to argue a case to overrule *Marbury* v. *Madison*, would you do so?

Judge STARR. No, absolutely not.

Senator SPECTER. If you were asked to argue a case to overrule *Brown* v. *Board of Education*, would you do so?

Judge STARR. Absolutely not.

Senator SPECTER. Thank you very much, Judge Starr. At this point, the light is yellow. I yield to my colleague, Senator Grassley. Senator Grassley. Senator Biden has left word for us just to proceed in his absence.

Senator GRASSLEY. We want to take a lot of liberty with that, don't we? [Laughter.]

Senator SPECTER. I think you have the raw power, as Judge Starr has decided, to go as far as you might. [Laughter.]

Judge STARR. I may regret my answer. [Laughter.]

Senator GRASSLEY. I know that I have missed a lot of very useful dialog that has gone on here in the period of time that I have been at the subcommittee of Appropriations and over voting on the floor of the Senate, and thank you very much for your patience.

I want to refer to some statements you have made. Many times, in public speeches and in your writings, you have said that when you are a judge, your mind must be a blank slate, right?

[No response.]

Senator GRASSLEY. Anyway, the Solicitor——

Judge STARR. Yes, I have said that.

Senator GRASSLEY. The Solicitor General, of course, the position you are taking now, is not that of being a judge. You, in fact, are an advocate, presumably one with strong views about constitutional interpretation. So, how are you going to make that transition from having a blank slate to a person who has got to have some strong views on some positions to take?

Judge STARR. Well, one has views as a judge. One tries as best one can to set those views aside as a judge, and not to allow one's personal predilections, to the fullest extent possible, to play in the judicial process.

But it is not that one is truly a blank slate, but one is to conduct oneself as if one were, if one is being the moral judge, the good judge. Lady justice is blind; that is the ideal. We all fall short of the ideal, but that is the ideal.

But it is not as if lady justice does not, in fact, have views; each judge does. Each judge brings his or her own views and perspectives to bear. But in my view of the good judge, the good judge should set those personal views aside to the very fullest extent that he or she can.

Now, in terms of the transition process itself, I suppose, in one sense, that I will simply be permitted, within the constraints and limitations of that office, not to be such a blank slate.

Senator GRASSLEY. But, admittedly, one in a position where you would come from a position with strong views on constitutional interpretation?

Judge STARR. Yes. I certainly have views on a wide variety of subjects and constitutional interpretation.

Senator GRASSLEY. In a speech last September 9, sponsored by the Bureau of National Affairs, you suggested that—and the quote is "the era of constitutional reform and initiative is a thing of the past." And you also said the Court is not embarking on any grand voyages or brave adventures.

But just this past term, the Court seemed to be willing to rethink some very controversial, key issues and decisions from the past. If you don't see any grand voyages in the near term, can you tell us what sort of side trips you might expect that you want to take to Court on?

Judge STARR. Well, Senator, the office of Solicitor General is very much a reactive office. It is an office to which client agencies of the Government, divisions of the Department, bring matters. They want to take their case to the court of appeals or to the Supreme Court, and so it is going to be reactive in that sense.

And so I cannot say that I have my map of voyages or trips that I would like to take, because my responsibility, if the Senate confirms me, is, in fact, to carry on in a highly professional way the work of that office, which is, at bottom, a law office with great demands upon it.

One does not have the liberty to go opine freely on a wide range of issues. One is obligated to handle this crushing caseload and to react and respond to that. So I would not—to answer very plainly and candidly, I would not, in fact, be entering that office with a specific agenda of matters that I wanted to pursue.

Senator GRASSLEY. I think that is a fair answer, but on the other hand, don't forget, as you are reacting, there are all sorts of opportunities, a whole reservoir of opportunities whether to appeal or not. And as you pick and choose from that reservoir, it seems to me like you do have an opportunity to pursue certain goals that you seek.

For instance, I have heard you speak about the exclusionary rule. Would there be something in that area that you would feel we ought to be doing something in?

Judge STARR. Well, I have long felt that the fourth amendment exclusionary rule, as opposed to the fifth amendment exclusionary rule, has enormous costs, and that the burdens are truly high.

I believe that in its present posture, the Supreme Court has been genuinely sensitive to those burdens, recognizing that the rule can, in fact, work a deflection of a trial from the determination of the guilt or innocence of the citizen charged to whether the police conducted themselves properly in a very difficult and delicate area of law. So I do have views on that subject.

However, as I was mentioning before, the Solicitor General should not be a disembodied voice, and if the law enforcement community within the Federal apparatus was not, in fact, presenting the Solicitor General with their considered views to the effect that this particular aspect of the exclusionary rule has created difficulties in the orderly and fair administration of the law, then I think it would ill-behoove me to seek that out on my own and to become, as I alluded to before, a disembodied voice.

I should be responsive, it seems to me, to the considered views of the community within the executive branch that I was representing. And, thus, to be very specific in response to your question, if Judge Sessions were not of the view that the exclusionary rule in its present posture were creating a present difficulty in the administration of justice, then I would think very long and very hard before I would embark sua sponte on an effort to have the Court revisit that question.

Senator GRASSLEY. OK. On another point, we have had over the past few years quite a debate about the methods of constitutional interpretation. On the one side, is the view that we should be governed by the text of the document, the so-called original understanding view, the other is that the document is sufficiently open-ended enough for judges to make of it what they wish, consistent with their own moral philosophy or sense of natural justice.

One of your predecessors, Charles Fried, was critical of this latter view, saying it, and I quote, "turned the Constitution into a picnic, to which the Framers brought the words and the judges the meaning."

I would like to know where you come out on that debate.

Judge **Starr**. Well, I certainly do believe in the Constitution as law. It is not simply a statement of ideals. It is more than an expression of a noble vision of human dignity. It is law. It is highly specific in certain very important respects.

The Supreme Court, in its daily work, pays very close attention and shows great respect for the language of the Constitution, and at times that language answers the legal question put before the Court. But as we all know, that is not always so.

Some of the terms of the Constitution are quite broad. In fact, some—we were talking about the exclusionary rule. The fourth amendment itself—the wording of the fourth amendment calls for judgment. It summons forth the judges to exercise judgment. The warrant clause and probable cause inform that judgment.

And so what is the meaning of an unreasonable search or seizure? I don't think that the text answers that question entirely and judgment will have to be brought to bear. And, thus, I think the critical area, Senator, is where the text does not itself, and the history of the Constitution does not, in fact, yield up a specific answer, and how will those questions be answered.

And it seems to me that the primary source that we look to is, in fact, the considered views of the judges who have gone before in interpreting that text. We have 200 years of constitutional history. That is a primary source of reflection and guidance to the courts and to lawyers in determining what it means.

The cruel and unusual punishment clause of the eighth amendment is similar, in my view. I don't accept the view that any punishment is currently acceptable under the eighth amendment simply because it existed at the time of the founding. I think that is wrong. I think that is a wrong kind of approach to constitutional interpretation.

But one looks not to moral philosophy, it seems to me, in determining what constitutes cruel and unusual, but one looks to the considered views of the people of the United States in history, as expressed in law.

And, thus, in the cruel and unusual punishment area, the fact that a number of States have seen fit, and the Congress of the United States has seen fit to embrace the death penalty, is something that should be very sobering indeed to the judge in determining whether a particular punishment is cruel and unusual.

Senator **Grassley**. There have been eras in our constitutional law history where the President and, by extension, his Solicitor General have believed the Supreme Court to be wrong and sought to get the Court to reconsider its views. I think of Stanley Reed as FDR's Solicitor General after the New Deal statutes had been found unconstitutional by the Supreme Court.

On the other hand, some Solicitors may have looked at their job as somehow making up some won-loss record before the High Court and, under those circumstances, may tend to shy away from asking the Court to change its mind.

How do you plan on striking this balance in the relationship between the Solicitor General like that set by Stanley Reed and the whole won-loss approach of some Solicitor Generals?

Judge **Starr**. Well, it seems to me the most important consideration, Senator, is to be right and true to one's conscience and the rule of law, and that may mean in a particular era that the Solicitor General has a very unfavorable won-loss batting average.

But that should not, in fact, dissuade a conscientious Solicitor General from, in fact, following, as his or her lights best lead him, to what the correct view of the law and the Constitution is. That is what is ultimately important.

So I applaud the distinguished occupants of that office who were willing, bravely, respectfully, to indicate to the Court that, in their judgment, the Court was mistaken. That is one of the noble functions of that office. It needs to be done with prudence, with circumspection, but one should not be cowardly in that process.

Senator **Grassley**. Well, I want a Solicitor General who can do more than just count to five on the Supreme Court for a majority. So I take it, then, from your answer that you wouldn't be afraid to argue an intellectually responsible position even where you were asking the Court to reverse itself and even where you knew that you couldn't count the five votes ahead of time?

Judge **Starr**. Well, if I knew in advance that the case was going to be lost, I would weigh that factor heavily in the balance. If I knew that it was a fruitless gesture, I would be concerned about that, but I would still be mindful of the examples of Stanley Reed and Robert Jackson, who went up bravely to a Supreme Court and argued respectfully, but vigorously to the Court that it was mistaken; that a half century of its jurisprudence was mistaken.

Senator **Grassley**. Some scholars suggest that the Solicitor General should adopt some sort of middle-of-the-road approach in arguing cases before the Court, to be very apolitical, to be neutral. Not everyone, of course, agrees with that. Perhaps it depends upon who gets to challenge the conventional Supreme Court wisdom. In other words, where you stand depends on where you sit.

For example, one of your colleagues on the D.C. Circuit, Chief Judge Wald, was once in the Carter Justice Department, where she was critical of such neutral approaches as interfering with the sound implementation of the administration's policy through litigation.

So what do you think is an appropriate model to follow—vigorous advocate for the President's and Attorney General's policy or a neutral adviser to the High Court?

Judge **Starr**. Well, these decisions are ultimately contextual decisions. I think that the ultimate loyalty that the Solicitor General has to have, as I have said before, is to the Constitution and the rule of law. That is the ultimate duty of the Solicitor General.

Now, if one can, in fact, proceed to pursue a particular policy consistent, in the SG's view, with the Constitution and the rule of law, then, yes, that is an appropriate model to provide vigorous advocacy, just as Robert Jackson and Stanley Reed would go forward and say, with all respect, we think your Lautner era of jurisprudence is profoundly wrong.

A Solicitor General worth his or her salt should be willing to do that. It depends upon the issue. It depends upon the Solicitor's vision and view of the Constitution and the rule of law, and that is very general because it ultimately has to be answered in the context of a specific case and a specific issue.

Senator **Grassley**. Mr. Chairman, that completes my questioning.

The **Chairman**. Thank you very much.

I am going to ask a few more questions, and I would offer you a brief recess, but I assume you had a brief recess for a moment.

Judge **Starr**. Yes, thank you, Mr. Chairman.

The **Chairman**. And your youngest daughter should know ice cream is in the offing; we are close.

Judge **Starr**. The last I heard, she was going to McDonald's.

The **Chairman**. All right.

In a case decided just last September, *Save Our Cumberland Mountains* v. *Hodel*, the full D.C. Court of Appeals decided that the prevailing market rate should be used to determine attorney fee awards for private attorneys who successfully represent a public interest client.

You dissented from that decision, arguing that the reduced hourly fee voluntarily charged to a public interest client was the appropriate rate for calculating the award. The majority's opinion warned against the danger of, in its words, quote, "decreasing reasonable fees because the attorneys conduct the litigation more as an act for the public good than as an effort for securing large monetary return."

Were you not concerned by this danger recognized by the majority of your colleagues?

Judge **Starr**. I was concerned with implementing and faithfully following what I saw as Congress' intent, and Congress' intent, as I read it—and, obviously, a majority of my colleagues thought I was wrong, and I have been wrong before.

But my reading of what Congress intended in that particular statute was that the purpose of the attorneys' fees provision was to be an enabling provision, and what did that mean? It meant access to a capable, competent attorney.

And I felt that Judge Malcolm Wilkey's decision in *Laffe* v. *Northwest Airlines*, which was the law of our circuit, was correct law. I thought that case was correctly decided. I believed in following stare decisis.

My dissent said that I am persuaded that Judge Wilkey's opinion for the court in *Laffe* adequately and faithfully captured what Congress was intending, and that the majority of my colleagues who saw fit to overturn the settled law of our circuit were incorrect.

Now, I hasten to add that I think recent decisions of the Supreme Court have proved my colleagues correct and me wrong.

The **Chairman**. In your dissenting opinion you wrote, quote, "It is a lawyer, not a lawyer of choice, that the statute seeks to provide." In point of fact, the aim of the relevant statute—isn't it designed to promote access to a competent lawyer, and certain public interest plaintiffs need the services of lawyers with special experience and expertise? Would the below-market fees you advocate permit these plaintiffs to secure adequate representation?

Judge STARR. I thought so. No. I agree that the statute certainly contemplated access to competent counsel. In this particular instance, competent counsel was, in fact, obtained, and the key was—the question in the case was, will that counsel charge the U.S. Treasury his customary hourly rate, or will he be able to ratchet that rate upward and charge the U.S. Treasury far more than the counsel charged his or her ordinary clients? In my view, the value of enablement was, in fact, satisfied there.

The CHAIRMAN. So the ordinary fees charged that you were looking at were ordinary fees they would charge for public interest work as opposed to ordinary fees they would charge for a corporate client, for example?

Judge STARR. Well, when we say public interest, this was, as I understand it, fees that were charged by—and to speak generally—these firms to their clients. This was not legal aid. The area in terms of legal aid had been decided by the Supreme Court's decision in *Blumby* v. *Stinson*.

This was, rather, charging to clients. I find it difficult to use the term public interest in this particular context because that is obviously a value judgment. But, in particular, I will be specific; I don't want to be evasive.

These were hourly rates, as I understand it, that were charged to paying clients, but they were a lower rate than a large corporation would pay. So a typical union pays lower hourly rates than a typical large corporation. That is simply the way the market works.

And the question was, will lawyers who represent, let us say, to stay with that example, unions at the rate of $100 an hour be compensated at a $100-an-hour rate, or will they be able to ratchet that up to the prevailing market rate?

The CHAIRMAN. To switch topics, if I may, for a moment, as we have all up here already mentioned, when Congress created the office of Solicitor General, it intended for the task—well, it wanted very much for someone of significant competence to be in that position. They used the phrase "of sufficient learning, ability, and experience that he can be sent into any court wherever the government has an interest in litigation."

Now, clearly, the burden of engaging in such wide-ranging advocacy at such an elevated level would be a test of legal skills for any attorney, even at the highest reaches of the profession. For this reason, your experience and resourcefulness will be critical to your successful service in the position, should you be confirmed.

Question 15c of the committee's questionnaire asked, quote, "Did you appear in court frequently, occasionally, or not at all?" In response, you indicated that the work you did in the Attorney General's office did not take you into court, and that while in private practice you were involved in a number of litigation activities, white collar crime matters, and two internal investigations that did not require court appearance.

The only affirmative statement of your courtroom experience was the following, "During my last two-and-a-half years with my law firm, I appeared in various courts in various proceedings as the circumstances warranted."

Could you elaborate a little bit on this response, Judge Starr, being more specific as to court proceedings and circumstances that you were involved with?

Judge STARR. Yes. When I first began the practice of law in Los Angeles at Gibson, Dunn and Crutcher, I was in court with some regularity in that 1-year tour of duty before my clerkship with Chief Justice Burger.

The CHAIRMAN. And you were just out of law school, I assume.

Judge STARR. I was a year out of law school because I had clerked on the court of appeals.

I appeared in such courts as the Superior Court for the City of Los Angeles—the county of Los Angeles—the Superior Court in Burbank, the superior court in Riverside—San Bernardino; excuse me.

I was involved in a major trial in Minneapolis. I was on the trial team in that trial. I was involved in the preparation of a brief in a major case that went before the Fourth Circuit Court of Appeals. I was on that brief-writing appellate team and had principal writing responsibilities during that year.

Now, during my tour of duty in Washington, I did not appear in court with great regularity. It was simply the nature of the functions and activities that I was called upon to handle that it was more of a Washington law practice. It was a litigation practice, but I was not in court with regularity.

I did appear in court. I certainly feel comfortable in courts, but the practice in Washington was much more of a Washington type practice, coupled with the fact that some of the matters with which I was involved, including grand jury proceedings, were very extensive, very involved, and we were doing our very best to stay out of court.

The CHAIRMAN. Have you been the lead counsel in any major trial?

Judge STARR. No.

The CHAIRMAN. Does my colleague from Iowa have any further questions?

Senator GRASSLEY. No.

The CHAIRMAN. Well, there are about 10 to 15 additional questions I have, but I have covered the essence of the areas that I would like to go into.

Let me ask staff here, are any of my colleagues intending to come back who have not asked questions yet?

[No response.]

The CHAIRMAN. Well, I have, as I said, Judge—and the quicker you can answer them, the better—I have some questions on the operation of the office, the future role of the courts, litigation experience, some of which I have touched on, and relationship with the Congress that I would like to discuss.

[Response to questions from Senators Biden, Heflin, and Simon, follow:]

WRITTEN QUESTIONS FROM SENATOR BIDEN

QUESTION 1

The Solicitor General is called upon to play two related but sometimes conflicting roles. First, he must play a "quasi-judicial" role, given his longstanding relationship with the Court, the substantial number of cases before the Court with which he is involved, and the degree to which the Court has come to rely on his presentations.

Justice Stewart put it well when he said in an interview that the Court views the Solicitor General as a "traffic cop" who helps control which cases the Court actually hears. And as one commentator has said:

> "Not only does the Court depend on the Solicitor General to serve as the primary mechanism for the regulation of its docket, but the Court perceives that it and the Solicitor General share a long term community of interest. The Court knows the character of the Solicitor General's advocacy as well as the reliability of his or her screening."

Second, as an advocate on behalf of the administration, he may be called upon to play a policy-making role.

What do you perceive your obligations to the Attorney General and the President to be, and what do you perceive your obligations to the Supreme Court to be?

ANSWER

As the question indicates, the Solicitor General is, indeed, obliged to play two related roles: advocate for the United States, on the one hand, and counselor to the Supreme Court, on the other. The former role may require direct consultation with the Attorney General and/or the President in particular cases, in order to obtain the fullest articulation and explanation of the United States' position. The latter role will involve absolute fidelity to law, meticulous preparation, scrupulous advocacy, and complete candor in order to provide the Court with the best possible legal guidance on the question at issue. It will also require a studious regard for the Supreme Court's docket and thus a frequent willingness to say no to requests to take cases to the High Court. These roles, I believe, can be harmoniously fulfilled through a firm commitment to circumspect advocacy of the positions advanced by the United States, coupled with a keen sensitivity to the burdens on the Court.

QUESTION 2

Part A

One factor that surely will bear on your independence in the Office of Solicitor General is whether you or some other party will have the final word on briefs filed with the Court.

Based on your discussions thus far with the Attorney General or other members of the Bush Administration, do you know whether briefs prepared by the Solicitor General's Office will have to be submitted to either the Attorney General or to the White House for approval?

ANSWER

I have had no specific discussions with the Attorney General or other members of the Bush Administration with respect to the particular procedures to be followed in this respect. However, my understanding of the practice under Attorney General Thornburgh is that the responsibility for drafting and preparing briefs rests entirely with the Office of the Solicitor General. My response to Part B will set forth my expectation based upon that practice.

Part B

In the event you have not had a discussion with the Bush Administration concerning authority over the submission of briefs, do you believe, based on your present expectations, that you will have to submit your briefs to the Attorney General or the White House for approval?

ANSWER

I would not expect that, in the ordinary case, briefs would be submitted to either the Attorney General or the White House for approval. Indeed, the enormous magnitude of the workload of the Solicitor General's Office would make any such procedure entirely impracticable. It is also, in my view, a profoundly unwise course of action, were any such customary practice to be suggested. The orderly work of the Office, including the rendering of independent professional judgment by the Office, cannot adequately be carried on without the assurance of the necessary latitude and professional freedom that has historically been enjoyed by that Office in crafting the briefs based upon the professional skill and judgment of the highly talented lawyers who serve in that Office.

At the same time, as I pointed out in my testimony, there have been (and surely will be again) instances where the Attorney General's and President's involvement in a particular case is entirely appropriate and proper. Issues of great constitutional importance to the country render entirely fitting, in my judgment, the direct and personal involvement of the Attorney General or even the President himself. The examples from history that I cited, including presidential involvement in the watershed cases of Brown v. Board of Education and Bakke v. Regents of the University of California, suggest the appropriateness of substantial presidential involvement in the (obviously few) exceptional cases that have far-reaching ramifications for the Nation.

QUESTION 3

In 1987, former Solicitor General Rex Lee described the dilemma that he had faced in the Office of Solicitor General as follows:

> "I have frankly concluded that it is virtually impossible in today's world to occupy a position like Solicitor General without, on the one hand, incurring the disfavor of some groups with strong ideological views or, on the other hand, impairing your credibility with the Court."

How do you intend to deal with this significant dilemma?

ANSWER

The dilemma that former Solicitor General Rex Lee describes is certainly tangible, no doubt, yet it is not in my view significant. The choice between "incurring the disfavor of some groups with strong ideological views" and "impairing [the Solicitor General's] credibility with the Court" is an easy one: the law and the Court come first. The Solicitor General serves the President and Attorney General, and ultimately the people of the United States. He does so by representing the United States with integrity before the Court. Maintaining credibility before the Court is an essential prerequisite to providing that effective representation. At times, the Solicitor General by faithfully doing his job will inevitably incur displeasure or hostility; it goes with the territory and should not be of surprise when it comes.

QUESTION 4

Part A

One of the critical factors that determines, in practice, the degree of independence that a Solicitor General will enjoy is his relationship with the Attorney General. A 1977 memorandum opinion rendered by the Justice Department's Office of Legal Counsel on the role of the Solicitor General states:

> **"If the Solicitor General is to be of real value, his judgment must be permitted to be dispositive in the ordinary course [of business]. The government's position should be changed by the Attorney General only in rare instances."**

Do you agree with that assessment and, if so, can you identify the "rare instances" in which intervention by the Attorney General may be justifiable?

__Part B__

If you do not agree with the preceding assessment of the role of the Solicitor General, can you explain your reasons and provide the committee with the standard that you would like to see followed in determining when the Attorney General should intervene in action by the Solicitor General?

__ANSWER__

I am in general accord with the views expressed in the quoted portion of the Office of Legal Counsel's memorandum opinion.

The Solicitor General should and almost inevitably will have broad discretion over the disposition of "the ordinary course [of business]." That ordinary course includes the thousands of decisions the Solicitor General must make regarding whether to permit the Government to appeal adverse decisions, whether to recommend that the Supreme Court hear and decide particular cases, and how to frame the Government's arguments before the Court. The Office of the Solicitor General possesses considerable expertise in making these judgments, and occupies a unique position to provide the uniformity and consistency that these decisions require. The Solicitor General must ensure that the Executive Branch speaks to the Supreme Court with a single, trustworthy voice. Of course, in making these decisions the Solicitor General must remain mindful of the President's and the Attorney General's important programmatic goals and interests.

There will, on occasion, be instances in which the Attorney General will and indeed should contribute to forming the Government's legal position. Those instances, I believe, will be relatively rare compared to the vast range of decisions presented to the Solicitor General. The instances when the Attorney General actually alters the Government's position will, I think, be rarer still. Yet by law and tradition, the Solicitor General serves and acts to assist the Attorney General. The occasions when the Attorney General will directly determine the Government's position cannot realistically be catalogued, but the Attorney General's personal involvement becomes more likely when the case at hand requires an evaluation peculiarly within the ken of the Executive rather than an evaluation of strictly legal sources. For example, those instances may arise when a particular case calls for judgment about the invocation or scope of essential Executive Branch functions and privileges, or about a contested issue of truly national import for which there is no clear legal answer.

QUESTION 5

If a situation arises in which the Solicitor General believes that guidance from the Attorney General is necessary, who do you believe should initiate the contact -- should it be left to the Solicitor General to seek the guidance of the Attorney General, or should it be the other way around?

ANSWER

As a general rule, the Solicitor General should seek the guidance of the Attorney General when the Solicitor General believes that that consultation will aid the formation and presentation of the Government's position before the Supreme Court. The rule is not, however, hard and fast. As a matter of law, the Attorney General retains responsibility for and ultimate direction of the Government's arguments before the courts, and in fulfilling those duties will undoubtedly see fit on occasion to "initiate the contact" with the Office of the Solicitor General. However, I would not expect that to occur with any regularity.

QUESTION 6

During the May 2 hearing, you acknowledged and paid tribute to the crucial role of stare decisis in the development of our constitutional jurisprudence. You referred to the "settled fabric" of the law, and stated that it would be improper to overturn a precedent once it attained that status.

What factors and values would you rely on in determining whether a decision of the Supreme Court has in fact become part of the "settled fabric" of the law so that as Solicitor General you would not call for its reversal?

ANSWER

As I stated before the Committee, principles of stare decisis acquire special force where a precedent has become part of the settled fabric of the law. This phrase primarily refers to the extent of the Court's reliance, over time, on a particular precedent. For example, the principle of stare decisis gains added force where the Court has frequently reaffirmed a precedent or where a precedent has provided the basis for further developments in one or more areas of the law. In other situations, such as the Lochner era, vigorous (and continuing) dissent has contributed to a precedent's eventual demise.

At the same time, the ultimate test must be whether a constitutional law precedent is in fact true to the meaning of the higher law of the Constitution and our constitutional traditions. The fact, for example, that Swift v. Tyson was on the books for almost 100 years did not cause the Court to flinch in eventually overturning that decision in the landmark case of Erie Railroad v. Tompkins. So too, the fact that Plessy v. Ferguson was on the books for over a half century did not dissuade the Court in 1954 from recapturing the true meaning of the words set forth in the Equal Protection Clause. And, as I indicated in response to questions at the hearing from Senator Grassley, the courageous examples set by President Roosevelt's Solicitors General (particularly Stanley Reed and Robert Jackson) bear eloquent testimony to the overriding importance of being true to basic constitutional principles, even if a majority of the Supreme Court has seen fit to reject those principles.

In short, just as Justice Brennan has indicated his disapprobation of Hans v. Louisiana's long-standing interpretation of the Eleventh Amendment, the Supreme Court (and thus the Solicitor General as the most frequent advocate in the Court) should be respectful of constitutional precedent, but open to considered arguments that a particular precedent is unfaithful to the language of the Constitution and the values which it ordains.

It is, in contrast, more important to maintain the stability of precedent (and thus achieve the underlying value of stare decisis) in statutory decisions. Your question suggests a primary focus on constitutional jurisprudence, but I would be remiss in failing to note that once a statutory interpretation becomes well-established (and continually, faithfully adhered to by the Court) it would be unwise and disruptive to the orderliness and predictability of law for the Solicitor General, except under the most unusual circumstances, to urge the Court to overturn a judicial interpretation which the Congress has not seen fit to undo.

QUESTION 7

Commenting on the filing of amicus curiae briefs during his tenure as Solicitor General, Archibald Cox has said:

> "We had the feeling when we filed [such a] brief that we had an even stricter responsibility to the guardians of the law than we normally did. We couldn't just take a strong position on behalf of a state, for example, we had to be especially careful about what we said the law was or should be."

If confirmed, do you expect to adhere to the standard set forth by Mr. Cox?

ANSWER

I certainly agree with Professor Cox that the Solicitor General has a strict responsibility to provide careful, thoughtful guidance to the Supreme Court in its amicus filings. Although this bedrock commitment to honest, meticulous advocacy should likewise apply to cases in which the United States is a party, I would agree that the duty to the Court is at its apex when the views of the Solicitor General have been invited by the Court or the Solicitor General is filing, sua sponte, an amicus brief.

QUESTION 8

One of the tools commonly used to interpret acts of Congress is legislative history.

In a 1987 article in the Duke Law Journal, you raised some doubts about, in your words, the "marginal" benefits associated with the use of legislative history. As you put it, "one might wonder whether the effort of poring over mountains of legislative materials is worth the candle."

As Solicitor General, do you expect that effort to be worth it, so to speak? How much use would you expect to make of legislative history?

ANSWER

In my view, resort to legislative history often yields "marginal benefits" because the statute itself constitutes the "fundamental source" for determining legislative intent. At the same time, under settled law, resort to legislative history is ordinarily appropriate where no clear answer emerges from the language and structure of the statute itself. Int'l Bhd. of Teamsters v. ICC, 801 F.2d 1423, 1426 (D.C. Cir. 1986). This principle was emphatically set forth by Justice Marshall, writing for the unanimous Court in Burlington Northern R. Co. v. Oklahoma Tax Comm'n, 107 S.Ct. 1855 (1987):

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive.

Id. at 1959-60. (citations omitted). An additional problem with legislative history is that it is often ambiguous or even internally contradictory. As Justice Marshall stated in the above-quoted case, "The parties have canvassed at length the 15-year legislative history of the Act. . . . We find the results of that investigation inconclusive and irrelevant." Id. at 1860.

These points in no wise diminish the fact that occasions exist when Congress' intention is illuminated by legislative history. If confirmed, I would not hesitate to rely on legislative history where the statutory language and structure did not provide a clear answer to the question at hand and the legislative history contained helpful insights into or indications of Congressional intent. Indeed, I differed from my colleagues in one case on precisely this point. In that case, ACLU v. FCC, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J. dissenting in part), I indicated that a statement in a Committee Report that directly addressed the disputed issue should prevail over statutory language that my colleagues believed pointed the court in a different direction. I concluded:

> I would defer to Congress' expression of intent in the relevant Committee Report under the unusual circumstances here, where the statute, as the majority candidly acknowledges, admits of some ambiguity; where the Report speaks clearly on the precise question at issue; and where the Report was expressly considered and adopted by both Houses.

Id. (cross references omitted).

QUESTION 9

Part A

Given the caseload of the Solicitor General's Office, one of the most common questions you are likely to confront is the degree of deference to give to executive agencies.

For example, the Securities and Exchange Commission may believe it has an issue that merits review by the Supreme Court.

As Solicitor General, however, you may disagree with the Commission's judgment on the broad policy issue presented by the case.

Your judicial record demonstrates that you believe the courts should be quite deferential to an agency's policy decisions. Do you believe that the Solicitor General should accord a different degree of deference to executive agencies than that properly granted by the courts? If so, under what circumstances should a Solicitor General defer to the policy decisions of an agency?

ANSWER

As I have indicated in my judicial writings, the duty of both the courts and the agencies is to adhere faithfully and conscientiously to the will of Congress. I made the same point extrajudicially in my speech before the federal Administrative Law Judges. It is only where the intent of Congress is unclear or, as stated by the Supreme Court in the Chevron case, where the meaning of the statutory provision in question is uncertain and ambiguous that it is appropriate to defer to a reasonable interpretation by the agencies.

It seems to me that, in faithfully discharging his duties, the Solicitor General is obliged to follow the mandate laid down by the Supreme Court in Chevron and its progeny. Thus, if the statute clearly points to one answer but an agency is urging a different, contrary answer, then I believe the Solicitor General should not, as a general matter, defer to the agency's view.

I hasten to add that the Supreme Court reversed one of my decisions in which I found the language of the statute to be clear and thus that the agency in question (the FDA) had to promulgate rules consistent with the notice-and-comment provisions of the Administrative Procedure Act. The Court in that case (Young v. Community Nutrition Institute) stated that although the Court of Appeals' reading of the statute was the "more natural" interpretation, there was nonetheless sufficient ambiguity in the statute to warrant deference to the agency. These judgments (as to the clarity or ambiguity of a statute) are thus highly difficult and contextual in nature; but at least the framework for guiding the analysis is clear. And that framework binds both courts and the Executive Branch, including the Solicitor General.

Part B

Should you be confirmed, how do you expect to resolve conflicts between your policy judgments and those of federal agencies seeking review by the Supreme Court?

ANSWER

On a pure question of policy, my job would be to present the case consistent with the agency's policy determination. If, however, the policy judgment of the agency in question was one that I simply thought was not permitted under the governing statute, then I would not defend that policy. Under those circumstances, consistent with the tradition of the Office as I understand it, I would be willing to consider authorizing the agency or department to file its own brief before the Supreme Court, but indicate in that brief that the views set forth therein were not those of the Solicitor General.

QUESTION 10

In response to one of my questions, you stated that you had a favorable view of the position of Counselor to the Solicitor General, and that, should you be confirmed, you intended to fill this currently vacant post. You further stated your belief that the Office of Solicitor General would benefit from having a lawyer with sterling legal credentials serve in this position.

In light of the unquestioned caliber and competence of those who have held the position of Deputy Solicitor General, why do you believe that the position of Counselor is necessary? Doesn't the very presence of an additional appointed official, at this high level of authority, create an increased risk of politicizing the Office of the Solicitor General?

ANSWER

As I indicated in my testimony, I strongly favored the creation of a non-career Deputy in the Office of the Solicitor General during my tenure as Counselor to Attorney General Smith. In my judgment, it is entirely fitting and proper, and consistent generally with the structure of the other litigating divisions of the Department (which must likewise conduct themselves entirely in accordance with the rule of law) that the Office have a non-career Deputy. It was my sense that that procedure worked well during the period when I was serving in the Department.

The ultimate value of the position, as I see it, is that the individual who serves as Acting Solicitor General (when the Solicitor General must recuse himself, as not infrequently happens) should be an individual who enjoys the complete confidence and trust of the Attorney General and the President. This is of manifest importance in cases of great moment. Former HEW Secretary Califano, in his book, noted with concern the fact that career attorneys in the Solicitor General's office who had served in the Nixon Justice Department were in the main responsible for fashioning the government's position in the Bakke litigation. Secretary Califano, and apparently others in the Carter

Administration, considered the views of the career Deputy Solicitor General completely hostile to the considered policy views of the Administration on a very basic issue of grave importance to the President and to the Nation. (Indeed, the views of the career Deputy were apparently viewed as quite inconsistent with those of the Assistant Attorney General in charge of the Civil Rights Division during the Carter Administration.) That sort of division and conflict is, in my judgment, unsound and unwise in the orderly administration and conduct of the Office.

At the same time, this should not be taken to mean that the individual who holds the non-career Deputy position can in any manner be animated by partisan considerations in discharging his or her duties, and thereby politicize the office. To the contrary, it is imperative that any such individual have impeccable legal credentials and standing in the legal community as a lawyer of exceptional ability, integrity, and dedication to the Constitution and the rule of law. If a person is truly distinguished in his or her professional accomplishments, then there should be no appearance whatsoever that the Office is being subjected to inappropriate political influences or considerations.

WRITTEN QUESTIONS FROM SENATOR HEFLIN

QUESTION 1

In your opinion, what type of experience should one have to be sufficiently qualified for the position of Solicitor General?

How should litigation experience factor in?

ANSWER

The Solicitor General must, by statute, be learned in the law, and a wide variety of experience may provide that requisite learning. Those who have served as Solicitor General have been drawn from quite different backgrounds -- from academia, from government, and, often, from the bench. No one set of experiences entirely prepares any lawyer to serve as Solicitor General, but virtually all who have held the post have demonstrated a deep understanding of the substance and development of constitutional law.

Litigation experience, in the relevant sense, is often quite helpful for preparing a lawyer to execute the duties of the Solicitor General. The most important type of experience is, of course, that which provides familiarity with and competence in appellate advocacy. In that respect, I have now been privileged to serve as a judge on the United States Court of Appeals for nearly six years. Each case provides the courtroom exchange that molds the effective appellate advocate. Each opinion I have written is in effect an argument before the legal community and, quite often, subject to Supreme Court evaluation and review in a very immediate sense. Additionally, the years during which I was privileged to serve as a law clerk to Chief Justice Warren Burger have given me helpful insights into what constitutes a successful Supreme Court argument, and my years of service in the Justice Department heightened that understanding of effective advocacy and of the operation of the Department. My years of legal practice as a litigator in a large law firm -- first as an associate and then, briefly, as a partner -- provide me with additional training that would, I hope, be of benefit.

QUESTION 2

What is the process by which the Solicitor General's position is determined in a given case before the Supreme Court?

ANSWER

In the typical case, one of the litigating divisions of the Justice Department makes a recommendation to the Solicitor General to file a petition for certiorari. That recommendation, as I understand it, is set forth in a written memorandum from the litigating division (approved by the Assistant Attorney General in charge of that division) and submitted to the Office of the Solicitor General. The memorandum sets forth the proposed position of the United States including the reasons supporting that legal position.

In the SG's office, that recommendation (and analysis) is reviewed by an Assistant to the Solicitor General. After his or her review, the Assistant then prepares a recommendation (again, with legal analysis) to the Solicitor General, which is then submitted to one of the Deputy Solicitors General (along with the entire file in the case). After that second level of review, the Deputy then prepares his or her own analysis and recommendation, which is submitted to the Solicitor General. If the Solicitor General approves the recommendation, then a draft of the petition for certiorari is prepared in the litigating division where the case arose. That draft is then subjected to the same review process (including rewriting and editing) at each of the three levels in the Office of the Solicitor General. The same process is, in general, followed in the preparation of the merits briefs themselves.

I should add that not infrequently the requests for Supreme Court review come to the Solicitor General from an independent agency of government or from a General Counsel of one of the departments of government. Typically, the same review and consideration process that I have described above is conducted in that circumstance. In the process, meetings and conferences to discuss the position (including specific legal arguments) to be taken by the United States may be held in the Office of the Solicitor General, conducted either by one of the Deputies or by the SG himself. The final determination of the position, of course, rests in the typical case with the Solicitor General.

QUESTION 3

As in the past, there will continue to be instances in which the Attorney General concludes that the judgment his Solicitor General has given him is a judgment with which he does not concur. In that event, the Attorney General has the clear statutory authority to direct the Solicitor General to take a contrary position. As Solicitor General, how would you react to such a reversal, knowing that you originally provided the Attorney General with your own best independent judgment?

Would your answer change if such reversals took place frequently?

ANSWER

As I indicated in my response to questions during the hearing, in those rare cases when my view turns out to be in conflict with the Attorney General's, my duty would be to advance plausible, legitimate legal arguments even if they differed from my own views, subject always to my own conscience. These questions are, in the main, ultimately judgment calls, and it may be that in a particular situation I would not be able, in conscience, to sign the brief. But it is equally clear that the Solicitor General's personal legal views, if contrary to the considered interests of the United States which can be supported with legitimate, plausible legal arguments, should not override the felt interests and needs of the United States.

I frankly do not foresee that reversals of the Solicitor General's position would take place frequently. However, if such reversals did occur frequently, it would call seriously into question my ability to discharge effectively the Solicitor General's duties and responsibilities.

WRITTEN QUESTIONS FROM SENATOR SIMON

QUESTION 1

Judge Starr, during your confirmation hearing for the D.C. Circuit Court of Appeals in 1983, you stated in response to a question posed by Senator Thurmond that if a statutory interpretation decision cannot be resolved by looking at the literal language of the statute, then "it is in fact appropriate to go to the legislative history of the statute. . . . That is an appropriate exercise, one that has been recognized by the Supreme Court from the outset." (Nomination Hearing of Starr, pp. 3-4, July 22, 1983)

In a 1986 opinion, however, you wrote that "it is, as we have said time and again, the statute's language which Congress enacted, not speeches or debates or reports crafted by assistants and advisors to those whom the people elected." (International Brotherhood of Teamsters v. ICC, 801 F.2d 1423 (1986).

This opinion and some of your more recent academic writings on the subject of the use of legislative history appear to be inconsistent with your testimony before this Committee.

I am not a lawyer but I am a United States Senator. The role of our staffs is not unlike the role of clerks to judges. Have you experienced a change in your thinking on legislative history over the last six years? What is your view on it today? How would Congressional intent in enacting a law play a part in your decisions as Solicitor General?

ANSWER

As the Supreme Court has uniformly held, courts are duty bound always to seek to determine, faithfully and impartially, Congress' intent. Since serving as a judge, I have had occasion to consider numerous cases involving very detailed and lengthy legislative histories. At times, I have, quite frankly, found the legislative history of a particular measure to be internally contradictory and conflicting. At other times, the history does little more than parrot the language of the statute. In light of these experiences, I have developed a more cautious attitude about ready reliance on legislative history. Nonetheless, my views on this question are, I believe, entirely consistent with the law as mandated by the Supreme Court, which I would, of course, continue to be bound to follow were I to become Solicitor General.

In my view, the statute itself constitutes the "fundamental source" for ascertaining legislative intent. Resort to legislative history is appropriate where no clear answer emerges from the statute's language and structure. Int'l Bhd. of Teamsters v. ICC, 801 F.2d 1423, 1426 (D.C. Cir. 1986). As I indicate in my response to the Chairman, this principle was emphatically set forth by

Justice Marshall, writing for a unanimous Court in Burlington Northern R. Co. v. Oklahoma Tax Comm'n, 107 S.Ct. 1855 (1987):

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive.

Id. at 1959-60. (citations omitted). As I indicate above, an additional problem with legislative history is that it is often ambiguous or even internally contradictory. As Justice Marshall stated in the above-quoted case, "The parties have canvassed at length the 15-year legislative history of the Act. . . . We find the results of that investigation inconclusive and irrelevant." Id. at 1860.

Of course, the fact that legislative history plays a subordinate role in discerning Congressional intent in no wise diminishes the bedrock fact that Congressional intent is dispositive in many of the cases handled by the Solicitor General. And it is undisputed that occasions exist when Congress' intention, clearly expressed through legislative history, should directly guide judical interpretation. Indeed, I differed from my colleagues in one case on precisely this point by relying on clarifying legislative history. In that case, ACLU v. FCC, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J. dissenting in part), I indicated that a statement set forth in a Committee Report that directly addressed the disputed issue should be given effect where the statute did not "speak with absolute crystalline clarity." I concluded:

> I would defer to Congress' expression of intent in the relevant Committee Report under the unusual circumstances here, where the statute, as the majority candidly acknowledges, admits of some ambiguity; where the Report speaks clearly on the precise question at issue; and where the Report was expressly considered and adopted by both Houses.

Id. (cross references omitted). That approach, I believe, faithfully follows existing law, which would of course bind me as Solicitor General if I am confirmed.

QUESTION 2

In the 1984 Missouri Law Review, you wrote a book review about Chief Justice Earl Warren. In that review, you quoted former Justice Robert Jackson who described his role as Attorney General as an advocate not always acting in ways that reflected his own views.

As Solicitor General, you will play a critical role in shaping the legal policy of the Administration. You will decide whether the United States should appeal particular cases and your office will present oral and written arguments before the Supreme Court.

Where do you draw the line between acting in furtherance of your own legal judgment and being an advocate for decisions that may not reflect your own views? How would you reconcile the differences?

ANSWER

If confirmed as Solicitor General, I would be charged with the obligation of advocating the interests of the United States while at the same time providing the Court with guidance on how best to analyze the legal issue at hand. In fulfilling this dual role, I foresee only a modest likelihood for a serious conflict between my own views and the position of the United States in any particular case. Theoretically, as was discussed during the hearing, a conflict would exist if I were asked to take a position before the Supreme Court that I believed to be legally indefensible. In this situation, I would simply not sign the brief on behalf of the Government. On the other hand, if a good, sound legal argument can be made in support of a position that furthers the interests of the United States, then, I would ordinarily feel duty bound to take that position, subject always to my conscience and professional judgment. Above all, I would be committed to representing the interests of the United States within the bounds of scrupulous advocacy and complete candor; positions pressed by the United States are, I believe, quite unlikely to threaten to take the Solicitor General outside of these bounds.

The **Chairman**. Although there are no witnesses who have asked to testify, there are two written statements that have been submitted; one, testimony of the Alliance for Justice, and the other, a written statement from People for the American Way. I ask unanimous consent that both of them be placed in the record at the appropriate place.

[Information follows:]

Alliance for Justice
A National Association of Organizations Working for Equal Justice
600 New Jersey Avenue, N.W. ■ Washington, D.C. 20001 ■ 202/662-9548

NAN ARON
Executive Director

FRANCES DUBROWSKI
Chair

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TESTIMONY OF
THE ALLIANCE FOR JUSTICE

BEFORE THE

UNITED STATES SENATE JUDICIARY COMMITTEE

ON THE NOMINATION OF

KENNETH STARR

TO THE

OFFICE OF SOLICITOR GENERAL

May 2, 1989

TESTIMONY OF
THE ALLIANCE FOR JUSTICE
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UNITED STATES SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF
KENNETH STARR TO THE OFFICE OF SOLICITOR GENERAL

May 2, 1989

The Alliance for Justice appreciates the opportunity to present testimony on the nomination of Judge Kenneth Starr to the Office of Solicitor General. The Alliance for Justice is a national association of public interest legal organizations, focusing on issues critical to the public interest community, such as access to the courts and judicial selection. The Alliance has serious reservations about President Bush's choice of Kenneth Starr. Based on a review of his opinions, articles and speeches, we are troubled that his writings do not reflect a commitment to basic constitutional values and principles. We are particularly concerned about Judge Starr's restrictive view on the role of the courts, his insensitivity to the rights of minorities, and his disrespect for the use of legislative history. As Solicitor General, his views will play a critical part in whether this Administration pursues justice in the courts of the nation.

THE ROLE OF THE SOLICITOR GENERAL

The Solicitor General has considerable influence on the courts and Congress, and consequently, on the development of the law. Occupying a unique position in our system of justice, the SG oversees all of the federal government's appellate litigation by determining which cases to appeal. Because the federal government is by far the most frequent litigant in the federal courts, the Solicitor General can, through case selection and argumentation, shape the direction of the courts' decisions on certain issues.

Historically, the Supreme Court has given great deference to the views of the Solicitor General. No other party before the Court has as much influence in setting the Court's docket. Although the Solicitor General is the lawyer for the executive branch before the Supreme Court, the Justices have come to expect the Solicitor to take the "long view" and help it determine which of the hundreds of cases to accept for review. The Court also invites the Solicitor General to submit amicus briefs in the especially difficult cases to guide its decisions. Former Solicitor General Rex Lee offered these reasons for the special deference given the office:

> "The positions taken by the Solicitor General for years have carried special weight with the Supreme Court because they are regarded as representing not merely the political views of the Administration but the broad interests of the nation."

In addition, Congress places enormous trust in the office. The Solicitor General exercises substantial control over the government's approach to statutory interpretation in the lower courts and exercises exclusive control when issues of statutory interpretation arise before the Supreme Court. The Solicitor General is responsible for defending the constitutionality of federal laws, and with it, the judgment of Congress. Congress expects the Solicitor General to interpret its acts according to its intentions. Otherwise, if the Solicitor undoes the work of

Congress, the legislative branch is forced to mount a corrective legislative effort. As Senator Joseph Biden stated during the hearing on the nomination of Charles Fried, "we rely upon the judgment of the Solicitor General in addition to the Attorney General. We look on it with great respect. It has impacted upon the deliberations of this body as to what we will and will not do."

This complex network of trust centering around the Solicitor General only has worked well because of the highly respected individuals who held the office -- Rex Lee, Wade McCree, Thurgood Marshall, Archibald Cox, Robert Jackson and John Davis, to name a few. In the last few years, however, the prestige of the office has suffered because of the extreme positions pursued by the Reagan Administration and Ed Meese, as in the Bob Jones University case, to the point where some referred to the position as the "Pamphleteer General". Because of the critical responsibilities of this position, it is incumbent that the appointed individual possess a vision of equal justice and a respect and understanding for the role of the courts in safeguarding fundamental rights and liberties.

THE RECORD OF JUDGE STARR

Judge Kenneth Starr has served on the federal Court of Appeals for the District of Columbia since 1983, the most important and influential circuit court in the country. In his five-and-half years on the bench, Judge Starr has participated in over 400 cases and authored almost 200 opinions -- majority, concurrences and dissents. He is generally acknowledged as a steadfast member of the conservative majority on the court. For example, he voted with Judge Robert Bork in all but 8 of the 102 cases in which they sat together, for a 93 percent agreement rate. Judge Starr has sometimes parted with his conservative colleagues on issues regarding freedoms of the press and of religion.

Restrictive View on the Role of the Courts. Judge Starr has a narrow view of the role of the courts, as if judges were still merely referees in private disputes of a common law nature. His opinions reflect little of the historical view, beginning with the seminal case, Marbury v. Madison, that federal courts are the final arbiters of the Constitution. In addition, his writings do not indicate a commitment to the recognized mission of the courts to protect the constitutional rights of minorities, the unrepresented and the powerless.

In Inmates of Occoquan v. Barry, 844 F.2d 828 (D.C. Cir. 1988), reh'g denied, 850 F.2d 796 (D.C. Cir. 1988), writing for the majority, Judge Starr reversed a lower court holding that the D.C. prison had violated the inmates' 8th Amendment rights against cruel and unusual punishment, even though witnesses from both sides had agreed that conditions within the prison were hideous. The prison's own administrators and special consultants testified at trial that the totality of the conditions -- overcrowding, assaults, lack of ventilation, excessive noice, lack of medical care, widespread disease, poor sanitation, and infestation -- were so serious and dangerous that a major disturbance was inevitable. After making extensive findings, the trial court concluded that the conditions violated the inmates' constitutional rights and constituted a "clear and present danger to the health and safety" of the inmates. As a result, the court ordered a cap placed on the prison population, with modifications to be made as conditions improved.

Judge Starr took specific issue with the lower court's order. He argued that the population cap was too broad of a remedy, and that the decision to impose it should have left to the political branches. In denying a rehearing request, he further stated:

> "Courts are not to be in the business of running prisons or seeking to make them better places. In a democratic society, that function is entrusted to the branches representative of the people."

850 F.2d at 802.

With his opinion in Occoquan, Judge Starr brought "25 years of prison litigation aimed at enforcing standards of decency...to an abrupt halt." 850 F.2d at 800 (Wald, C.J., dissenting from denial of en banc review). Judge Starr put on judicial "blinders" and completely ignored the fact that the guarantees in the Bill of Rights, including the Eighth Amendment, serve as the fundamental protection from arbitrary decisions of the elected branches. In fact, when construing and applying one of the rights guaranteed by the Constitution and providing a remedy, the federal courts perform one of their core functions. As the dissent from the panel opinion noted:

> "If the Bill of Rights' prohibition against the imposition of cruel and unusual punishment in the correctional setting is to have meaning, therefore, the enforcement of the constitutional standards -- as in other contexts where powerless or unpopular segments of the population require constitutional protection, e.g., as in some First Amendment

> situations -- can be supplied only by the courts."

844 F.2d at 650. In deferring to the political branches to resolve the prison's inhumane conditions, Judge Starr also relied on promises made by the District's attorneys at oral argument, despite numerous, broken promises and ignored court orders.

While scholars and judges may debate the proper role of the courts and judicial restraint, Judge Starr in Occoquan took restraint to an extreme, with radical consequences. After reviewing all of the Eighth Amendment cases, he retreated from one of the most commonly accepted remedies for decreasing the overtaxing of prison resources -- a population cap -- and selected instead the least protective. It is important to note that when the case was first filed in 1986, the prison held 1,500 inmates. Conditions improved slightly under the court-ordered cap, before it was removed by Judge Starr. However, now the inmates number over 2,500, and the District has not made the promised improvements. Occoquan represents the extent to which Judge Starr will allow constitutional violations to go unabated.

Judge Starr's writings on the role of the courts lack a commitment to the concept of the courts as an institution imbued with the highest authority to enforce constitutional guarantees. Troubling enough from a circuit court judge, this absence of a commitment would be especially disturbing if it finds a voice at the highest levels of appellate litigation.

Judge Starr has also attempted to circumscribe the role of the courts by limiting access to them. Over the years, Congress has enacted over one hundred fee-shifting statutes allowing litigants who prevail in civil rights, environmental and other cases to recover their attorney fees from the adjudged wrongdoer. These statutes have enabled citizens to secure legal representation to enforce constitutional and statutory rights in the courts.

Judge Starr has written 12 opinions involving attorney fees. In 10 of those, he wrote to deny or scale back the awards. In a 1986 South Texas Law Review article, Judge Starr flatly stated that Congress had one thought in mind in passing fee-shifting statutes: "encouragement of litigation" -- the bogeyman for the court-reform-minded. Judge Starr also recounted the criticisms of fee-shifting statutes offered by others, but he gave short shrift to the arguments of supporters. Furthermore, he stated:

> "But while ensuring compliance with law is a noble purpose, some believe that fee shifting mechanisms are not the appropriate method to achieve that goal."

28 South Tex. L. Rev. 227 (1986). Judge Starr does not explicitly join in the criticism by "some" (which, in a footnote, included his former Justice Department colleague Bruce Fein). However, his own doubts about fee-shifting were implicit in his characterizations.

In Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988) (en banc), Judge Starr expressed more explicitly his distaste for fee-shifting. The SOCM majority held that private attorneys handling public interest cases should be compensated at the same rates accorded traditional private firm and legal aid attorneys. The majority based the decision on Congress's stated purpose in enacting fee-shifting statutes -- to enable individuals and organizations to obtain competent counsel and seek enforcement of their rights.

In dissent, Judge Starr was plainly irked that the decision would make his job harder; and to him, the decision only increased the income of the bar:

> "Judicial ratemaking will now be re-ushered in with gusto, with countless hours undoubtedly awaiting the court....With our increasing docket summoning us to even greater productivity, I must confess to a singular want of excitement over renewing the judicial focus on the level of income to be enjoyed by the distinguished bar of his jurisdiction."

857 F.2d at 1534. From now on, instead of following a simple yet inequitable system for determining attorney fee awards, the majority decided that the courts must make a closer examination of the facts to determine the applicable market rate. Judge Starr, focusing on the extra work now facing him in calculating awards, clearly ignored the laudable purpose of fee-shifting to provide citizen access to the courts.

Judge Starr also bemoaned the fact that the fee-shifting statutes do not allow the federal government to obtain fee awards when it prevails. Again, Judge Starr failed to see not only the purpose behind the statutes (the government already has competent counsel), but also that such a provision would discourage potential claimants from seeking redress in the courts. In sum, his writings suggest, at the very least, a failure to appreciate Congress's chosen means to achieve that goal.

Judge Starr also has disparaged other methods to increase access to the courts -- namely, public interest legal organizations, which are in the forefront of bringing major impact litigation on behalf of minorities, the poor and the unrepresented. In NAACP Legal Defense & Educational Fund, Inc. v. Devine, 727 F.2d 1247 (D.C. Cir. 1984), rev'd, 473 U.S. 788, 105 S.Ct 3439 (1985), the majority ruled in favor of legal advocacy groups which had been blocked from participating in the federal government's annual charity fundraising drive. Judge Starr dissented, stating that the majority had applied the wrong First Amendment analysis. The Supreme Court agreed and reversed the decision.

However, in his dissent, Judge Starr went on to make a gratuitous, generalized attack on the work of legal advocacy groups, such as the NAACP LDEF, the Natural Resources Defense Council, the Federally Employed Women Legal and Education Fund, the Puerto Rican LDEF, the Indian Law Resources Center, and the Lawyers' Committee for Civil Rights Under Law. Judge Starr stated:

> "The connection between the activities in which advocacy groups engage and aid for the needy is speculative for two reasons. First, the methods by which advocacy groups advance their policies are risky. In the course of litigation, lobbying, or influencing elections an advocacy group may spend a huge sum of money only to lose. Second, the policies of such groups advance are often controversial in the sense that opinion is still divided over whether they aid the needy or not. Indeed, since many of these groups have antagonistic aims, it is simply not possible that all their policies are bringing net benefit to the needy."

727 F.2d at 1279, n.39. Judge Starr's personal view of advocacy groups completely ignores the critical role that these groups have played in representing minorities and the powerless in the courts of this nation.

Insensitivity to the Rights of Minorities. In safeguarding the rights of the unrepresented and powerless, over the years the courts have acquired a special role in eliminating discrimination in society. However, sitting on one of the country's most important courts, Judge Starr failed to show a commitment to that role by his almost flippant decision in a discrimination case.

Hammond v. Barry, 813 F.2d 412, reh'g denied, 826 F.2d 73 (D.C.Cir. 1987), reh'g granted, in part, en banc, 833 F.2d 367, vacted, 841 F.2d 426, cert. denied, 108 S.Ct. 2023 (1988), involved a challenge to the District of Columbia fire department's affirmative action plan. The plan was intended to remove the vestiges of past discriminatory hiring tests and practices by requiring the racial composition of each entering class hired from the 1984 entrance exam to reflect the racial makeup of the qualified applicants for the job; that is, because 60 percent of those passing the examination were black, 60 percent of those hired must be black. The plan would end when the 1984 applicant list was exhausted.

Judge Starr invalidated the plan under Title VII, as the dissent noted, by "gerrymandering of the facts". The lower court had noted, and the parties had agreed, that the 60 percent figure matched the percentage of blacks who had passed the 1984 entry level exam. The court had also found that the best evidence of a racial imbalance in fire department hirings (38 percent black) was the racial makeup of people applying (74 percent black in 1980 and nearly 65 percent in 1984). Starr, however, dismissed the lower court's findings and mischaracterized the percentage goal established by the plan. He stated that the 60 percent figure reflected, not the percentage of blacks passing the exam, but the black component of the District's workforce (64 percent), thus amounting to a prohibited "quota system". Furthermore, Starr believed the the lower court should have used a different workforce population -- that of the Washington, D.C., metropolitan area, which is less than 30 percent black.

However, no relationship was established below between the racial composition of the metropolitan area and that of the District's employees. Judge Starr neglected to point out that even using the larger population area, three-fourths of the applicants for firefighter jobs were black. Moreover, as the lower court noted and the dissent emphasized, blacks have comprised over 50 percent of the District government's total workforce since at least 1964, whereas the percentage for firemen ranged from 14 to 19.2 percent between 1964-1969 and only 27 percent in 1977, when the District's affirmative action law was passed. Finally, Starr even refused to give any weight to the fact that a discriminatory test had been used by the fire department for years.

Judge Starr's distortion of the facts and disregard of the lower court's findings in Hammond, to reach his desired result, suggested a willful blindness to the fact that blacks had apparently been rejected in far greater proportion than whites had. His trivializing of the discrimination evidence reflects a lack of understanding of the history of discrimination against minorities and its deleterious impact.

Disrespect for Legislative History. Consistent with his 19th century view on the role of the courts and his nostalgia for the common law, Judge Starr has eschewed the modern tool of legislative history for interpreting statutes, even though he recognized that statutory interpretation comprises the bulk of the federal courts caseload. In a recent law review article, Judge Starr set out his views on the use of legislative history:

> "The concerns about the use of legislative history fall into two broad categories. The first I would label democratic theory concerns; the second category I would suggest more humbly as practical day-to-day concerns. *Taken together, these concerns suggest that the dangers inherent in the use of legislative history generally outweigh the arguable advantages resulting from its use.*"

1987 Duke L.J. 371, 375 (emphasis added). In regard to democratic theory concerns, Judge Starr stated that a Congressional committee report cannot be authoritative because "in many cases the report adopted will likely not even have been reviewed, much less written or studied, by all members." Judge Starr also believed that relying on legislative history ignores the executive branch, because the President approves legislation without benefit of legislative history: "the President's view of the statute may be different from that of Congress, and from the subsequent interpretation rendered by the courts" -- possibly leading to a "statute that the President would not have signed." Judge Starr also condemned use of legislative history for pulling "the federal courts -- the nonpolitical branch -- into the political process of legislation....By using legislative history, the courts may be acting in an area that should be out of bounds to the unelected branch."

In regard to practical concerns, Judge Starr criticized using legislative history because of "its potential for manipulation.... Lobbyists maneuver to get their clients' opinions into the mass of legislative materials; judges, in turn, may be tempted to use the convenient tool of legislative history as escape from the hard work of actual judging." According to Judge Starr, using legislative history also imposes substantial monetary costs -- lawyers must "wade through formidable mounds of material" and "the judiciary must also devote time searching through mountains of material." Finally, Judge Starr contended that legislative history is often useless because it is "inconclusive".

However, Judge Starr failed to realize the value of legislative history in cutting through ambiguous provisions in a statute. In the same Duke Law Journal issue, D.C. Circuit Judge Abner Mikva took issue with Starr, stating that courts will have to accept the fact that, as Congress passes laws on increasingly complicated subjects, "the words are going to be more and more difficult to comprehend." Consequently, because of the "fuzzy language in the statute...we as judges have to look at the committee reports and at other clues." Judge Mikva added: "We cannot just tell Congress that they could have said it more plainly, and that until they do, we are not going to enforce it. We can't say, 'We pass.'" According to Judge Mikva, a former member of Congress, "the committee report is the most useful device [because it] represents the synthesis of the last meaningful discussion and debate on the issue." Judge Mikva further stated:

> "If judges are to make Congressional primacy meaningful, they cannot afford to ignore those obvious tools which members of Congress use to explain what they are doing and to describe the meaning of the words used in the statute. Those who refuse to use the tools are merely saying that they don't want to look. Their feeling is that you ought not to look at the legislative process if you want to digest it because it is just too messy and untidy. But the alternative is to give a judge the relatively unrestrained power to look just at the statute's words and at Webster's Dictionary, and to decide with Webster's what the law of the land will be."

1987 Duke L.J. 380, 386. Judicial restraint and democratic theory "not only require courts to give appropriate deference to the first branch, but also to recognize that the elected policymakers make the law, and therefore the law is what they say it is."

Judge Starr, however, has not abandoned his views on using legislative history to the law journals. In his opinions, he has offered them as valid reasons for disregarding such interpretative materials. In fact, in SOCM, supra, his treatment of the fee-shifting statute's legislative history is rather derogatory. In deciding SOCM, the majority relied on the House and Senate reports on the bill, which had approvingly discussed several lower court cases on fee awards. The majority noted that the Supreme Court had looked to the same Congressional reports in a landmark fee award case. Judge Starr, in dissent, faulted the majority for adhering to "case cites found in the bowels of secondary materials produced in the word processors of Capitol Hill." 857 F.2d at 1528 (emphasis added).

Judge Starr's cynical views on legislative history suggest that he may ignore Congress's full statement on legislation and impose, in some measure, his own values. Because a large part of the Solicitor General's role is interpreting acts of Congress, there is a real question whether Judge Starr will defend these acts, faithful to the intent of Congress.

CONCLUSION

The office of Solicitor General requires integrity, judicial restraint, and respect for the Constitution, Congress, the courts and the rule of law. As Senator Howell Heflin stated during the confirmation hearings for Charles Fried, "he must balance his role as advocate for the United States, with a more institutional role of protector of the public interest and preserver of principles embodied in the Constitution." The mission of this office was well stated in a brief filed by a former Solicitor General in a case which the government sacrificed winning on appeal by admitting that it had erred at trial:

> "The United States wins its point whenever justice is done its citizens in the courts."

The nation deserves an advocate with the insight of a Robert Jackson, the conscience of an Archibald Cox, the public spiritedness of a Thurgood Marshall, and the intelligence of a Judge Wade McCree.

After eight years of politicizing this office, it is time for the Solicitor General to chart a more just and fair course. Instead, the Bush Administration has chosen a Solicitor General who has not shown an affirmative commitment to the entire Bill of Rights, nor to the role of the courts, the authority of Congress, and the rights of minorities. While a few of Judge Starr's opinions have supported First Amendment rights of the press and of religion, other decisions have raised questions about his basic fairness. We urge this Committee to seek assurances from Judge Starr will pledge and fulfill a commitment to equal justice for all Americans.

People For The American Way
ACTION FUND

May 1, 1989

Senator Joseph Biden
Chairman
Senate Judiciary Committee
U.S. Senate
Washington, D.C.

Dear Chairman Biden:

I am writing on behalf of the People For the American Way Action Fund regarding the nomination of Kenneth Starr to be Solicitor General of the United States. The Action Fund has 275,000 members nationwide who are united by a commitment to defend the Constitution and the rights and liberties it guarantees for all Americans.

People For the American Way Action Fund neither supports nor opposes the nomination of Kenneth Starr. However, we believe the nomination presents the committee with the opportunity to explore questions concerning the role of the Solicitor General, particularly in light of reports about the politicization of the office during Attorney General Meese's tenure at the Department of Justice. We urge the committee to explore Judge Starr's views on the role of this office, as well as his views on the role of the courts in safeguarding constitutional rights. We also hope that the committee will use the hearings to discuss the proper standards for the Solicitor General in carrying out the functions of the office.

Lincoln Caplan in his book, The Tenth Justice, noted, "Of all the nation's public officials, including the Attorney General and the Justices of the Supreme Court, the Solicitor General is the only one who is required by statute to be 'learned in the law.'" The Solicitor General is the Executive branch's attorney before the Supreme Court. However, his job extends beyond advocacy for his client. He has a dual responsibility, to the Justice Department on one hand, and to the Court on the other. The Court looks to the Solicitor General to help guide it in its choice of cases and in the resolution of those it hears. The Court expects that in so doing, the Solicitor General will, as Caplan states, "pay close attention to the impact of the case on the law itself."

For decades, the Solicitor General performed this role with a dedication to the rule of law and without regard to partisan politics. Although a political appointee, he served both his President and the Court as an independent legal advisor, "the

2000 M Street, NW, Suite 400, Washington, D.C. 20036 (202) 467-4999

Tenth Justice." During the Reagan administration this changed. The Solicitor General was called upon to become a political advocate.

Several eventualities heralded this change. A new appointment was added to the Solicitor General's inner circle -- a political deputy charged with keeping an eye on political considerations in the course of the office's legal deliberations. The Administration's first Solicitor General, Rex Lee, resigned because, in his words, he did not want to serve as the "Pamphleteer General." The Reagan administration's social agenda, having met with defeat repeatedly in Congress, became the agenda of the Solicitor General's office; anti-abortion, pro-school prayer, and anti-affirmative action briefs were filed in the Court. Many of these briefs went far beyond an analysis of the immediate issues to call for sweeping changes in the law. Several seemed to be an interpretation of Attorney General Smith's 1982 statement calling upon the courts to heed "the groundswell of conservatism evidenced by the 1980 election." (New York Times, January 26, 1982, p. B8.)

So transparent and heavy handed were these efforts that Supreme Court Justice, and former Solicitor General, Thurgood Marshall said in a television interview, "I think there are certain movements that the Department of Justice is making which could be interpreted as trying to undermine the Supreme Court itself, which is of course impossible. They can't separate the political from the legal. They write political speeches and put the word 'brief' on them."

Judge Starr served as an official in the Attorney General's office during a substantial part of the time in which the Office of Solicitor General was being transformed into a political unit. It would be appropriate and most relevant for the committee to inquire into a) the role that Judge Starr played at that time in formulating positions taken by the Solicitor General, b) his views then about the appropriate role of the office, and c) his current views about the subject.

With the appointment of its Solicitor General, the Bush administration has an opportunity to restore the office to its traditional role, one which is insulated from politics. We hope that these hearings will provide the nominee with an opportunity to discuss his understanding of the office of the Solicitor General.

Judge Starr has already compiled a lengthy record of decisions as a member of the U.S. Court of Appeals for the District of Columbia Circuit, and has written extensively in legal publications. One of his law review articles explores his views about the use of legislative history when judges interpret statutes. Observations About the Use of Legislative History, 1987 Duke L.J. 361, 371. In that piece, Judge Starr expresses his concerns that legislative history may not reflect the motivations of legislators. He notes that legislators may not read the committee reports which are frequently drafted by staff and molded by lobbyists and attorneys. He states that "the use of legislative history may also encourage high fiction in interpreting statutes," arguing that courts should look to statutory language rather than legislative history in deciding questions of interpretation. Of course, these issues only arise when a statute is not clear on its face. Judge Starr's views seem to encourage courts to substitute judicial activism in place of contemporaneous evidence of legislative intent when interpreting statutes. We urge the committee to explore these views with Judge Starr as well.

We look forward to a candid exploration of these issues during Judge Starr's hearings.

Yours truly,

John Buchanan
Chairman

The **Chairman**. Judge, the undertaking you are about to begin is of significant consequence. I know you understand that well. I am pleased and hopeful—pleased with your sense of how the law has developed over the last 60 years, and your sense of what the role of the Solicitor General should be, and particularly your acknowledgement of the importance of the independence, particularly the one question I asked you, and that is what would you do if you believed there was no legitimate legal argument to take a case you were asked to take or petition the Supreme Court on.

And so I expect, based on what I know now—I don't expect the written answers to change my view—I expect that I would be not only able, but more than happy to support your nomination.

There may be several of my colleagues—we are debating now an issue on the floor, and that is what is occupying some of my colleagues, an issue out of the Judiciary Committee relating to the Martin Luther King holiday. Senator Helms has a view somewhat different than—well, he has a different view than many of my colleagues, I suspect, and that is what is occupying some of the time right now, although there is a recess at the moment.

But there may be additional written questions. We are not going to burden you with questions for the purpose of delay. I think it is very important that the President have a Solicitor General in place as rapidly as possible, and it is my intention to move that along.

So the more quickly you can answer the questions in writing, the quicker we can move, and I expect you ought to be able to do that, without any exaggeration, in the next day or two, would be my guess.

If there are no further questions, having done trial work myself, I advise you to answer the question I am about to ask you no, in the negative, and that is do you have anything else to say?

Judge **Starr**. No, Mr. Chairman, other than thank you.

The **Chairman**. One of the first things a very distinguished trial lawyer for whom I worked said was never ask a witness a question for which you do not know the answer, number two. And, number two, if it is all going your way, sit down.

And I think it is all going your way at this point, and so without any further comment, the hearing will stand adjourned.

[The biographical information of the nominee follows:]

KENNETH W. STARR

Birth:	July 21, 1946	Vernon, Texas
Legal Residence:	Virginia	
Marital Status:	Married	Alice Mendell Starr 3 children
Education:	1964 - 1966	Harding College
	1966	San Antonio College
	1966 - 1968	George Washington University A.B. degree
	1968 - 1969	Brown University A.M. degree
	1970 - 1973	Duke Law School J.D. degree
Bar:	1973	California
	1979	Virginia
	1979	District of Columbia
Experience:	1973 - 1974	Law Clerk, Hon. David Dyer U.S. Ct of Appeals, 5th Cir
	1974 - 1975	Gibson, Dunn & Crutcher Associate (Calif Office)
	1975 - 1977	Law Clerk, Hon. Warren Burger Supreme Court of U.S.
	1977 - 1980	Gibson, Dunn & Crutcher Associate (DC Office)
	1981 - 1983	Counselor to the Attorney General U.S. Department of Justice
	1983 - present	United States Circuit Judge U.S. Ct of Appeals, DC Circuit
Office:	U.S. Courthouse 3rd & Constitution Avenue, NW Washington, D.C. 20001 202 535-3000	
Home:	6455 Madison Court McLean, Virginia 22101	

To be Solicitor General

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (including any former names used.)

   Kenneth Winston Starr

2. Address: List current place of residence and office address(es).

   6455 Madison Court
   McLean, Virginia 22101

   United States Court of Appeals
   United States Courthouse
   3rd & Constitution Ave., N.W.
   Washington, D.C. 20001

3. Date and place of birth.

   July 21, 1946 Vernon, Texas

4. Marital Status (including maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Married Alice M. Starr
   (Maiden name) Alice Jean Mendell

   Advertising and Public Relations Consultant
   WEST*GROUP
   1600 Anderson Road
   McLean, Virginia 22102

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Duke University School of Law
   1970-1973 J.D. (1973)

   Brown University
   1968-1969 A.M. (1969)

   George Washington University
   1966-1968 A.B. (1968)

   Harvard University
   Summers 1967-1968

   San Antonio College
   Spring 1966 Summer 1964

   Harding College
   1964-January 1966

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Duke University School of Law
Durham, North Carolina
Part time employee - Law Library 1971-1973

Frost & Jacobs
Cincinnati, Ohio
Law Clerk Summer 1971

Thelen, Marrin, Johnson & Bridges
San Francisco, California
Law Clerk Summer 1972

Gibson, Dunn & Crutcher
Associate 1974-1975; 1977-1980
Elected to Partnership in November 1980.

Langley Nonprofit Housing Development Corporation
McLean, Virginia 22101
Board of Directors June 1986-present

Trinity United Methodist Church
McLean, Virginia
Chairman, Administrative Board January 1987-present
Chairman, Council on Ministries 1984-1986

See also those listed in questions 14 and 15.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Academic Scholarship - George Washington University

University Fellowship - Brown University

Academic Scholarship - Duke Law School
Order of the Coif

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give

the titles and dates of any offices which you have held in such groups.

California Bar Association - Member	1973-Present
American Bar Association - Member	1973-Present
Judicial Administration Div. - Appellate Judges Conference - Member	1984-Present
AJC/Executive Committee	1988-Present
Chairman, Committee on Federal Pre-emption	1987-Present
Vice-Chairman, Ad Hoc Committee on Act of State Doctrine	1979-1981
Member, Ad Hoc Committee on Costs of Death Penalty	1984-Present
American Bar Foundation, Fellow	1987-Present
District of Columbia Bar Ass'n - Member	1973-Present
Virginia Bar Association - Member	1979-Present
Administrative Conference of the United States - Member	1988-Present
Judicial Conference of the United States, Committee on the Bicentennial, Member	1985-Present
Judicial Fellows Commission, Commissioner	1985-Present
Federal Judicial Center, Committee on Appellate Education, Member	1987-Present
American Law Institute - Member	1987-Present
American Judicature Society - Member	1983-Present
Institute of Judicial Administration - Member	1981-Present

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

None, other than those listed in questions 6 and 9.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of California (and all inferior courts)
December 1973

District of Columbia Court of Appeals (and Superior Court)
November 1979

United States District Court for the District of Columbia
September 1979

Supreme Court of Virginia (and all inferior courts)
September 1979

Supreme Court of the United States
March 1989

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

"Tribute," Annual Survey of American Law, Bernard Schwartz Dedication at xiii March 1989

"The Establishment Clause," 41 Oklahoma Law Review 477 Fall 1988

"Of Forests and Trees: Structuralism in the Interpretation of Statutes," 56 George Washington Law Review 703 May & August 1988

"The Relationship of Church and State: The Views of the Founding Fathers," 1987 Yearbook, The Supreme Court Historical Society (1987)

"Judicial Review of Administrative Action," 39 Administrative Law Review 353 (panel discussion) Summer 1987

"A Tribute to Chief Justice Warren E. Burger," 100 Harvard Law Review 971 March 1987

"Observations About the Use of Legislative History: A Colloquy with Judge Abner Mikva," 1987 Duke Law Journal 371 (1987)

"Chief Justice Burger's Contribution to American Jurisprudence," 1986 Supreme Court Historical Society Year Book 18

"The Impetus for Sentencing Reform in the Criminal Justice System," Crime and Punishment in Modern America (P. McGuigan & J. Pascale ed. (1986))

"The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court," 28 South Texas Law Journal 189 October 1986

"Judicial Review in the Post-Chevron Era," 3 Yale Journal on Regulation 283
Spring 1986

"Proposed Reforms for Federal Habeas Corpus,"
1 Duke Law Alumni Magazine 10 Summer 1983

"Congress and the Conglomerate Merger Phenomenon: The Introduction of Antitrust Proposals to Address Non-Antitrust Concerns," with Julian O. von Kalinowski 17 Harvard Journal of Legislation 209 Spring 1980

"Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 12," with A. P. Parsons 4 Ecology Law Quarterly 881 (1975)

"Federal Judicial Invalidation as a Remedy for Irregularities in State Elections," 49 New York University Law Review 1092 December 1974

"Inspection Rights of Corporate Stockholders: Toward a More Effective Statutory Model," 26 University of Florida Law Review 179 Winter 1974

"The Framework of Anglo-Soviet Commercial Relations: The British View," 37 Law and Contemporary Problems 448 Summer 1972

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. June 1988

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Counselor to the Attorney General of the United States
January 1981 - October 1983 (Appointed)

Staff Assistant to Congressman Robert Price (R-Tex.)
February 1966 - June 1968 (Appointed)

15. Legal Career:

    a. Describe chronologically your law practice and experience after graduation from law school including:

        1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk:

        Law clerk to Judge David W. Dyer
        United States Court of Appeals for the Fifth Circuit

September 1973 - August 1974

Law Clerk to Chief Justice Warren E. Burger
United States Supreme Court, July 1975 - August 1977

2. whether you practiced alone, and if so, the addresses and dates;

No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

United States Department of Justice
Washington, D.C. 20530
Counselor to the Attorney General of the United States
January 1981 - October 1983

Gibson, Dunn & Crutcher
818 Connecticut Ave., N.W.
(presently 1050 Connecticut Ave., N.W.
Washington, D.C. 20036)
September 1977 - November 1980
Associate
November 1980 - January 20, 1981
Partner

Gibson, Dunn & Crutcher
515 S. Flower Street
(presently 333 South Grand Ave.)
Los Angeles, California 90071
Associate
September 1974 - July 1975

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

From January 1981 until becoming a Circuit Judge in October 1983, I served at the Department of Justice in an advisory and counseling role to the Attorney General of the United States in the full range of matters, including litigation, in which the Department was involved.

In the Washington, D.C. office of Gibson, Dunn & Crutcher, where I served from the fall of 1977 to early 1981, the nature of my practice was overwhelmingly in litigation of all types, civil, criminal and administrative. My practice became more heavily oriented toward white-collar crime and enforcement matters, ranging from grand jury investigations to SEC enforcement actions, in my final two years. My civil litigation matters were almost exclusively commercial and antitrust in nature, with non-antitrust cases as the matters for which I was primarily or exclusively in charge. My role in antitrust matters, which were principally large and protracted proceedings, was typically as one member of a team of lawyers. Throughout my tenure in the firm's Washington office, I also engaged in antitrust counseling for the firm's clients as well as counseling as to Supreme Court practice and federal regulatory matters. I was also the principal litigator on behalf of the firm's largest Washington-based client throughout my tenure in Washington.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Typical clients were large corporations, such as Planning Research Corporation, a NYSE-listed professional services organization; Marriott Corporation; Pfizer, Inc. (a pharmaceutical firm); the Ralph M. Parsons Company (a construction and engineering firm); the National Bank of Washington; Twentieth Century Fox; and Times-Mirror, Inc. I also represented the City of Palm Beach, Florida and other Florida municipalities in administrative proceedings before the CAB. My areas of specialty, as indicated above, included litigation, counseling as to federal law issues, including antitrust counseling, and defense of SEC enforcement proceedings.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, described each such variance, giving dates.

Throughout my tenure in the Office of the Attorney General, my litigation activities did not take me into court. During my last two and a half years with Gibson, Dunn & Crutcher, I appeared in various courts in various proceedings as the circumstances warranted. My white-collar crime matters, however, principally involved pre-trial activities, such as grand jury investigations and SEC Enforcement Division investigations. In two instances in which I was heavily involved, my firm served as Special Counsel to conduct an investigation into whether any illegal or improper activities had been carried on by the client's officers or employees, and thus did not involve court appearances.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

Except with respect to a pro bono publico matter in Superior Court for the District of Columbia, my appearances were exclusively in the federal courts or before federal administrative agencies.

3. What percentage of your litigation was:

(a) civil;
(b) criminal.

In private practice, my litigation activities were overwhelmingly civil in nature initially. By the time of my resignation from the firm in January 1981, my practice was almost evenly divided between civil and criminal/enforcement matters.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

None. The litigation matters handled prior to public service were resolved short of trial. In none of the criminal matters were indictments ultimately returned. The civil litigation matters during that period were either settled prior to trial or were otherwise resolved, e.g. through prevailing on pre-trial motions.

5. What percentage of these trials was:

   (a) jury;
   (b) non-jury.

See answer to 4, above.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;

   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and

   (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) In re Planning Research Corporation. This case involved a federal grand jury and administrative (Inspector General) investigation into alleged fraudulent billing practices in connection with the engineering services contract of Planning Research Corporation (NYSE) at the Kennedy Space Center, Florida. The matter involved a major FBI investigation. Although the investigation began in December 1979, no indictment or information had been returned as of the time I left the firm in January 1981. Along with John Olson of the firm's Washington office, I was principally responsible for the defense of the case, as well as for negotiations with NASA on behalf of the client. The matter was of overriding importance to a major client of the firm, implicating as it did the future of the client's single largest contract. The proceeding was in federal district court for

the Middle District of Florida. No other party was involved in the case. Our Florida co-counsel were Jeffry R. Jontz, whose current address is Holland & Knight, 255 South Orange Ave., Suite 750, Orlando, Florida 32801, telephone: 305-425-8500; and Harris Dittmar, Bedell, Bedell, Dittmar and Zehmer, 1500 Barnett Bank Building, Jacksonville, Florida 32202, telephone: 904-353-0211.

The FBI investigation was under the ultimate supervision of then United States Attorney Gary Betz, whose current address is 8829 Bay Point Drive, Tampa, Florida 33614. Telephone: 813-229-7707.

(2) State of Iowa v. Planning Research Corporation. This civil case was filed by the State of Iowa in 1977 alleging breach of contract in connection with the design and implementation of a state-wide law enforcement and traffic records information system. Allegations were also advanced in the case as to improper practices by my client's representatives in the form of gratuities to state officials. The latter allegations were the subject of a federal grand jury inquiry, which I handled and which was promptly resolved without prosecutorial action. I was principally responsible for the handling of the litigation, although a Los Angeles-based partner of the firm, Arthur L. Sherwood, had ultimate supervisory authority over the case. The case, after protracted pre-trial proceedings, was settled in 1979 prior to trial on conditions highly agreeable to our client. Our Des Moines co-counsel was David Belin, of the firm of Belin, Harris, Helmick & Heartney, 2000 Financial Center, Des Moines, Iowa 50309. Telephone: 515-243-7100.

The principal attorney for the State of Iowa was Assistant Attorney General John Perkins, whose address at the time of the litigation was Office of the Attorney General, State of Iowa, Des Moines, Iowa 50319. Telephone: 515-281-5164.

(3) Electronic Memories & Magnetics v. Comnet, Inc. This civil case was brought in 1979 on behalf of a California-based computer memory manufacturer in federal district court in the District of Columbia. I handled on behalf of the plaintiff EMM (NYSE) all liability issues. Following extensive discovery, EMM prevailed on a motion for summary judgment before Judge Aubrey Robinson, who filed an unpublished opinion. I was exclusively responsible for the case save for damages issues, which were resolved in a settlement following the court's grant of summary judgment. There was no co-counsel on the case, but Richard Dashefsky of Gibson, Dunn & Crutcher's Washington office handled the damages issues. His address is: 1050 Connecticut Ave., N.W., Washington, D.C. 20036. Telephone: 202-955-8500. Counsel for Comnet, Inc. was Dan Clements, then of Arent, Fox, Kintner, Plotkin & Kahn, 1050 Connecticut Ave., N.W., Washington, D.C. 20036. Telephone: 202-857-6000.

(4) Marriott Corporation v. Consumer Product Safety Commission. No. C-80-3912 (N.D. Cal.) I was responsible for administrative and federal district court litigation on behalf of Marriott Corporation (NYSE), involving an assertion by the Consumer Product Safety Commission of jurisdiction over Marriott's theme park facilities arising out of an amusement ride accident. The administrative proceeding involved protracted negotiations with the CPSC in which I was actively and substantially involved, but the negotiations were carried on under the ultimate responsibility of one of the partners in the Washington, D.C. office, John F. Olson,

Telephone: 202-955-8500. The administrative proceeding was ultimately settled in an arrangement which the client viewed as highly satisfactory and which received favorable comment from industry. Upon settlement of the proceeding, the federal district court action was voluntarily dismissed prior to judgment.

Serving in effect as co-counsel in the case were Marriott's in-house counsel, including particularly Stephen A. West, Vice President and Associate General Counsel of Marriott Corporation, and Sharon Herman, a senior attorney at Marriott. Their address is Marriott Drive, Washington, D.C. 20058. Telephone 202-879-7553. The CPSC was represented by a team of lawyers, led by the then Executive Director of the Commission, Richard Gross. Mr. Gross' current business address is National Consumer Cooperative Bank, 2001 S Street, N.W., Room 502, Washington, D.C. 20009. Telephone: 202-745-4740.

5. In re National Bank of Washington. I served as one of two senior lawyers on a team involving a number of our firm's attorneys in connection with a matter arising out of a federal grand jury investigation and inquiry by federal regulatory authorities into the loan practices and related activities of the National Bank of Washington. The inquiry began in early 1980 and continued until late summer of 1980. It was a highly intensive matter, given the notoriety which attended allegations of improper or illegal practices in connection with loans by the bank.

Our firm served as Special Counsel to the Board of Directors. In that capacity, we carried on an intensive investigation, culminating in a report to the Board which was cooperating with federal authorities in the grand jury investigation and bank regulatory inquiries. The matter was of considerable importance to the bank by virtue of the obvious adverse effects of the charges on the institution's reputation and in light of possible sanctions by regulatory authorities, quite aside from possible criminal sanctions against individual officers or directors. The matter was terminated without indictment or information being returned or filed. The representatives of the client with whom I most closely worked were an outside director, Webb C. Hayes, III, a senior partner of the firm of Baker & Hostetler, 818 Connecticut Ave., N.W., Washington, D.C. 20006. Telephone: 202-861-1500; and National Bank of Washington's General Counsel, Kathleen W. Collins, whose current address is Dow, Lohnes & Albertson, 1255 23rd St., N.W., Washington, D.C. 20037. Telephone: 202-857-2948. A team of lawyers from the Washington, D.C. firm of Shea & Gardner served as defense counsel for the bank. The senior member of the defense team was Stephen J. Pollak, whose address is 1800 Massachusetts Ave., N.W., Washington, D.C. 20036. Telephone: 202-828-2000.

6. Norman Davis v. Planning Research Corporation, No. H78-270 (D. Conn.). In 1978, following protracted negotiations, a lawsuit was filed against our client, Planning Research Corporation, arising out of the acquisition of a computer software firm in Hartford, Connecticut. The suit alleged breach of contract for failure to pay in accordance with the terms of the acquisition agreement. PRC counterclaimed on grounds of breach of warranty and fraudulent misrepresentations. Following extensive pre-trial proceedings, the matter was settled in a manner highly satisfactory to our client. I was principally responsible for the litigation. Our co-counsel in Hartford was the firm of Murtha, Cullina,

Richter & Pinney; the principal attorney on the case was Francis J. Brady, whose address is 101 Pearl Street, Hartford, Conn. 06103. Telephone: 203-549-4500. Opposing counsel in the case was William H. Champlin, III, whose firm at the time was Alcorn, Bakewell & Smith, One American Row, Hartford, Connecticut 06103. Telephone: 203-522-1216.

7. In re The Ralph M. Parsons Company and SEC v. The Ralph M. Parsons Company. In late 1977, an SEC enforcement proceeding and a grand jury investigation were instituted concurrently into possible illegal or questionable overseas payments by representatives and officers of The Ralph M. Parsons Co., a large, publicly held engineering and construction firm (NYSE) based in Pasadena, California. Given the importance of the issue to a large client of long standing with our firm, the ultimate responsibility for these two matters was vested in two of the firm's most senior partners, Julian O. von Kalinowski of the Litigation Department, and Arthur W. Schmutz of the Corporate Department, both in Los Angeles. I was the principal lawyer in the Washington office involved in the two proceedings and worked as the second-chair litigator in the SEC enforcement proceeding. The SEC enforcement matter culminated in a consent decree on favorable terms entered into in federal district court in Washington. The grand jury investigation eventually concluded in late 1979 with no indictment or information returned.

The principal attorney from the SEC Enforcement Division was Marvin G. Pickholz, whose current address is: 2000 Pennsylvania Ave., N.W., Washington, D.C. 20006. Telephone: 202-463-7887. The principal attorney from the Department of Justice was Peter Clark, whose address at the time was: Fraud Section, Department of Justice, 315 9th St., N.W., Room 326, Washington, D.C. 20530. Telephone: 202-724-6942.

8. Litigation matters involving PRC Realty Systems, Inc.

Throughout my tenure with the Washington office of the firm, I served as the principal litigation counsel for PRC Realty Systems, Inc., which was the largest provider of computerized real estate information services in the country. These matters were varied, ranging from contract disputes and threats of termination by various real estate boards to antitrust investigations, including alleged violations of Ohio antitrust law by the client. While no single matter rose to the level of a major piece of litigation, my practice invariably included one or more active matters for this rapidly growing company. The matters were all handled with no judgment of liability or the like. The most appropriate individuals to discuss this area of my work are Robert S. Holcombe, the then Vice President and General Counsel of Planning Research Corporation, the parent company of PRC Realty Systmes, Inc., and Burt Helfinstein, the President of Realty Systems during the period of my representation of the firm. Mr. Holcombe's address at the time was: 1500 Planning Research Drive, McLean, Virginia 22101. Telephone 703-556-1030. Mr. Helfinstein's address at the time was 8758 Brook Road, McLean, Virginia 22101. Telephone: 703-893-7482.

9. In re Textron Inc. In mid-1978, in connection with the Senate confirmation hearings of G. William Miller as Chairman of the Federal Reserve

Board, allegations arose as to possible illegal or questionable overseas payments by Textron, Inc. (NYSE), a large conglomerate based in Providence, Rhode Island which Mr. Miller had served as Chairman of the Board and chief executive officer. Both an SEC investigation and a federal grand jury investigation were instituted in the wake of those allegations. Gibson, Dunn & Crutcher was selected as Special Counsel to the Special Committee of the Board of Directors and charged with conducting an investigation into possible questionable payments overseas and any other possible illegal or improper activity by Textron, Inc., its subsidiaries or operating divisions. My own involvement in this matter was highly intense from the summer of 1978 through the spring of 1979. Numerous attorneys in our firm were engaged in this matter from various departments and offices of the firm. I was the senior litigator from the Washington office involved in the investigation. Throughout these proceedings, the principal SEC Enforcement Division attorney was Eugene Goldman, whose current address is: Laxalt, Washington, Perito & Dubuc, Suite 1010, 1120 Connecticut Ave., N.W., Washington, D.C. 20036. Telephone: 202-857-4000. Textron, Inc. was represented by Arnold & Porter, with John D. Hawke, Jr., being most actively involved in the matter. Mr. Hawke's address is 1200 New Hampshire Ave., N.W., Washington, D.C. 20036. Telephone: 202-872-6700. The partner in charge of this matter for Gibson, Dunn & Crutcher was Francis M. Wheat, whose address is 333 South Grand Avenue, Los Angeles, California 90072.

The matter was concluded with no indictment of the corporation or its officers.

10. Antitrust litigation and counseling.

Throughout my tenure with the firm, I was actively involved in antitrust litigation and the counseling of clients with respect to antitrust matters. For example, I was actively and substantially involved in the case of United States v. Pfizer, Inc. That case was tried in federal district court in Minneapolis beginning in 1974 on into 1976. I was physically present in Minneapolis as a member of the trial team in mid-1975 before leaving the firm for my clerkship with the Chief Justice. The lawyer in charge of the matter was Julian O. von Kalinowski of the firm's Los Angeles office, who was also physically present in Minneapolis at that time.

During this same period, I was involved in the preparation of Pfizer's brief on appeal in the Fourth Circuit in the related case of State of North Carolina v. Pfizer, et al. I was principally responsible for drafting the legal argument in that brief with respect to the issue of collateral estoppel. Pfizer prevailed in the Fourth Circuit in an opinion reported at 537 F.2d 67 (4th Cir. 1976).

Similarly, in the Washington, D.C. office, I was actively involved in various large antitrust proceedings, including United States v. Columbia Pictures, et al. This civil antitrust action was brought in 1980 in the Southern District of New York alleging antitrust violations by several major studios, including our client Twentieth Century Fox, and Getty Oil in a joint venture for establishing a cable television network, Premier. I was substantially involved in, among other things, drafting legal arguments for Twentieth Century Fox in the injunctive action brought in 1980 by the Antitrust Division of the Department of Justice. The litigation resulted in a judgment in federal district court holding that the joint venture's activities were violative of the federal antitrust laws and preliminarily enjoining the operation of Premier. The decision is reported at 507 F. Supp. 412 (1980). I served as the senior litigation lawyer in Washington on that matter for Twentieth Century Fox, although the matter was under the direct responsibility and supervision of Julian O. von Kalinowski in the firm's Los Angeles office.

I was also involved in an FTC proceeding against Times-Mirror, Inc. in 1977-1979, arising out of Times-Mirror's pricing practices with respect to classified advertising. The matter was ultimately tried before an administrative law judge in Los Angeles; my involvement was limited to Washington, D.C. activities, including handling discovery motions and related matters before the ALJ in Washington. That case was likewise under the supervision of the firm's senior antitrust litigator, Julian O. von Kalinowski. His address is: Gibson, Dunn & Crutcher, 333 South Grand Avenue, Los Angeles, California 90071. Telephone: 213-229-7000.

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I provided in any number of instances advice to our Los Angeles and other offices about various and sundry aspects of practice before agencies and courts in Washington, D.C. Counseling to lawyers (and clients of the firm directly) was a common part of my practice, and the matters ranged over a wide spectrum of Washington practice. Those activities were limited to administrative and court matters; I did not engage in any legislative activity, save for monitoring legislative developments on the international trade front for California-based clients. From time to time, I assisted in connection with various aspects of corporate practice, including serving as counsel to one small business firm in Washington.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I would take such steps, including recusal, as appear necessary or appropriate in connection with any matter as to which I either had a conflict or appearance of conflict. That would be true with respect to any enterprise in which I (or any immediate family member) had any financial interest (through stock ownership or debt instruments). I would also intend to recuse myself from participation in any matter in which my former firm was representing any party thereto and from any matter involving a client of the firm, regardless of the identity of the client's counsel, as to whose matters I was substantially involved while engaged in the private practice of law.

   I am currently engaged in discussions with the Office of Government Ethics concerning the possibility of establishing a qualified diversified blind trust.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

   I had previously informally agreed (no written agreement or final arrangements) to teach a seminar in administrative law at the Georgetown Law Center in the fall of 1989. Were the Senate to confirm me, I would immediately inform the Law Center that I do not intend to go forward with those arrangements.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   Report attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Attached plus 5 schedules.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilties.

No. However, I have served as a volunteer in a number of campaigns for many years and for various candidates for Federal and State offices prior to entering government service. I also served as a precinct captain for the Republican Party of Virginia (1978-1980) and as Operations Chairman for the McLean-Great Falls area of Fairfax County (1978-1980).

SF 278 (Rev. 1/85)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3206-0062

Page 1

Financial Disclosure Report

Reporting Status *(Check Appropriate Box)*

☐ Incumbent ☒ New Entrant, Nominee, or Candidate ☐ Termination Filer

Agency Use Only:

OGE Use Only:

Date of Appointment, Candidacy, Election or Nomination *(Mo., Day, Yr.)*:

Termination Date *(If Applicable)* *(Month, Day, Year)*:

Reporting Individual's Name
Last Name: Starr
First Name and Middle Initial: Kenneth W.

Position for Which Filing
Title of Position: Solicitor General
Department or Agency *(If Applicable)*: Department of Justice

Location of Present Office
Address *(Number, Street, City, State and ZIP Code)*: U.S. Courthouse, 3rd & Const. Ave., N.W., D.C. 20001
Telephone No. *(Include Area Code)*: 202-535-3000

Position(s) Held With the Federal Government During the Preceding 12 Months *(If Not Same as Above)*
Title of Position(s) and Date(s) Held: United States Circuit Judge

Presidential Nominees Subject to Senate Confirmation
Name of Congressional Committee Considering Nomination: Judiciary Committee
Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No

Certification
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.
Signature of Reporting Individual: Kenneth W. Starr
Date *(Month, Day, Year)*: March 20, 1989

Other Review (If desired by agency)
Signature of Other Reviewer:
Date *(Month, Day, Year)*:

Agency Ethics Official's Opinion
The information contained in this report discloses no conflict of interest under applicable laws and regulations.
Signature of Designated Agency Ethics Official/Reviewing Official:
Date *(Month, Day, Year)*:

Office of Government Ethics Use Only
Signature:
Date *(Month, Day, Year)*:

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for Income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I** (Liabilities)—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II** (Agreements and Arrangements)—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Comments of Reviewing Officials *(If additional space is required, use the reverse side of this sheet)*

(Check box if comments are continued on the reverse side) ☐

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Page Number 2

Schedule A

Reporting Individual's Name

Kenneth W. Starr

Assets and Income

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources			BLOCK B Valuation of Assets							BLOCK C Income																	BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐			Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)								Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for those assets including those sold for a loss.	
S or DC			None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
	Examples	X Y Z Common				x				x									x								x	
		Doe Jones & Smith, Homelown, USA			x											ptnrshp income									$50,000			
S	1	U.S. Trust Co. Market Rate				X				X									X									
S	2	IBM Corp. Com					X			X									X								X	
S	3	Barden Corp. Com	X							X								X										
S	4	U.S. Trust Corp. Com				X				X									X									
S	5	Novo Industries Com		X						X							X											
S	6	Hartford Steam Boiler Com				X				X								X										
S	7	Proctor & Gamble Co. Com				X				X								X										
S	8	Intermediate Term Tax Exempt Bond Fund				X						X								X								
S	9	Long Term Tax Exempt Bond Fund				X						X									X							
S	10	Zurn Industries Com				X				X									X									

Reporting Individual's Name
Kenneth W. Starr

Assets and Income

Page Number	3	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the **actual amount** of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A
Assets & Income Sources

Identify each asset and income source of yours, your spouse(S) and your dependent child (DC).

NONE ☐

	BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets: Category of Value (X)							BLOCK C Income: Type of Income (X)							Category of Amount of Income (X)										BLOCK D Transactions Test: If yes, complete Schd. B Part I for those assets including those sold for a loss	
		None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
Examples	X Y Z Common				x				x									x								x	
	Doe Jones & Smith, Hometown, USA			x											ptnrshp income									$50,000			
S	Stock Fund for Trusts				X				X								X										
S	Int'l Stock Fund for Trusts			X					X								X										
DC	Treasury Bonds			X							X						X										
DC	Morrisons Cafeteria Com	X							X							X											
DC	Treasury Certificate		X								X						X										
DC	UST Master Equity Funds			X					X									X									
DC	McDonald's Corp. Com				X				X								X										
J	NVRyan Corp. Com				X				X										X								
J	Dreyfus Liquid Assets						X		X										X								
	Gerber Energy Int'l	X							none							X											

SF 278 (Rev. [illegible])
FPM Chapter 734
U.S. Office of Personnel Management

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OMB No. [illegible]

Reporting Individual's Name		Page Number	Schedule
Kenneth W. Starr	**Assets and Income**	4	A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the **actual amount** of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets							BLOCK C Income																	BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)										If yes, complete Schd. B Part I for those assets including those sold for a loss	
S or DC		None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
Examples	X Y Z Common				x				x									x								x	
	Doe Jones & Smith, Hometown, USA			x											ptnrship income									$50,000			
J	Interest on promissory note 318 N. Carolina Ave, SE, DC	X									X										X					X	
J	Innisbrook efficiency condo Tarpon Springs, Florida					X				X										X							
J	Ocean High Time Sharing Week-Ocean City, MD		X						none							X											
J	Lubbock AK Ltd. partnership	X							none							X											
J	Interest on promissory note-Reston VA townhouse				X						X							X									
J	Interstate Gen. Co. Com		X						X								X										
J	Fairfax Co. VA REDV. & HSG tax exempt bonds					X					X								X								
J	NVR Federal Savings		X								X						X										
S	Dreyfus A Bonds plus - IRA		X								X						X										
S	Dreyfus Growth Opp. Fund - IRA		X						X								X										

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OMB No. 3209-0002

Reporting Individual's Name	Assets and Income	Page Number	5	Schedule A
Kenneth W. Starr				

ll Filers: In BLOCK A report (a) the
ntity of each asset held for the produc
on of income at the close of the reporting
eriod which had a fair market value ex
eeding $1000 and (b) any other asset
r source of income which generated over
100 in income during the reporting period.
his includes but is not limited to em
loyers, stocks, bonds, tax shelters, bank
ccounts, real property, mutual funds,
nnuities, IRA assets, assets of certain
rusts, commodities futures, personal busi
esses and partnership interests. Exclude
our personal residence unless you rent it
ut. See instructions for rules on bank
ccounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the **actual amount** of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets							BLOCK C Income																	BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC).	Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)								Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for those assets including those sold for a loss	
NONE ☐	None (or less than $1001)	$1,001 $5,000	$5,001 $15,000	$15,001 $50,000	$50,001 $100,000	$100,001 $250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101 $1,000	$1,001 $2,500	$2,501 $5,000	$5,001 $15,000	$15,001 $50,000	$50,001 $100,000	Over $100,000			YES	NO
Example: X Y Z Common				x				x									x								x	
Example: Doe Jones & Smith, Hometown, USA			x											partnership income									$50 000			
Dreyfus Growth Opp. Fund IRA		X						X								X										
11 speeches-Brookings Institution																		X						Mo:3/4/5/6 7/9/10/12 1988		
4 speeches-The Federalist Society																		X						Mo:3/10/12 1988		
judging writing competition ASCAP																	X							Nov., 1988		
NVRyan- Director, Consumer Affairs																										
WESTGROUP- Advertising & Public Relations Consultant																										

SF 278 (Rev. 1/85)
5 CFR Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3206-0017

Reporting Individual's Name Kenneth W. Starr	Page Number	6	Schedule B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☐

S or DC		Identification of Assets	Type of Transaction (X): Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	Amount of Transaction (X): $1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000
	Example	X Y Z Common	X			2/1/83			X			
1 S		Barden Corp. Com		X		1/20/88	X					
2 J		Interest on promissory note: 318 N. Carolina Ave., S.E., D.C. (Foreclosure due to lack of payment)		X		10/5/88					X	
3												
4												
5												
6												

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only: Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. **Exclude** transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), **exclude** gifts from relatives and **exclude** gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☐

S		Source (Name and Address)	Brief Description	Value
	Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/83	$500
		Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1		Federalist Society: New Haven, Oakland, Palo Alto, Ithaca	transportation, food & lodging	$2,726
2		Duke Univ. School of Law, Durham, N.C.	transportation, food & lodging	709
3		Southwestern Legal Foundation, Dallas, TX	transportation, food & lodging	1,447
4		Canadian Inst. for Adm. of Justice (Montreal)	transportation, food & lodging	467
5		Moot Court: Washington Univ. in St. Louis, St. Louis, MO	transportation, food & lodging	310
6		Cornell Univ. Moot Court, Ithaca, NY	transportation, food & lodging	438

SF 278 (Rev. 1/83)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name Kenneth W. Starr		Page Number	7	Schedule	C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

S or DC		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
	Examples	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	25 yrs.			X		
		John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
J	1	Dominion Bank	5 year Equity Loan	1986	floating	5 yrs		X			
J	2	Securities Settlement Corp.	3 week margin acct.	1988				X	paid in full		
	3										
	4										
	5										
	6										

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☒

	Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example.	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Hometown, USA	7/75 ptnership agmnt

SF 278 (Rev. [illegible])
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name
Kenneth W. Starr

Page Number	8	Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples:	Nat'l Assn. of Rock Collectors, NY, NY	Non profit education	President	6/82	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/75	11/83
	Langley Nonprofit Housing Development Corporation, McLean, VA	Non-profit home for mentally retarded adults	Board of Directors	6/86	present
	Duke University School of Law, Durham, N.C.	educational institution	Board of Visitors	1/88	present
	Brigham Young University, J. Reuben Clark Law School, Provo,UT	educational institution	Board of Visitors	2/89	present

Part II
Compensation In Excess Of $5000
Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☒

	Source (Name and Address)	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, USA	Legal services
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	125	000	
U.S. Government securities—add schedule (1)	30	000	
Listed securities—add schedule (2)	366	120	
Unlisted securities—add schedule (3)	15	000	
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule (4)	406	340	
Real estate mortgages receivable	38	850	
Autos and other personal property	30	000	
Cash value—life insurance		0	
Other assets—itemize:			
IRA accounts	23	000	
Fairfax Co. Bonds	54	200	
Total assets	1,088	510	

LIABILITIES			
Notes payable to banks—secured	54	000	
Notes payable to banks—unsecured		0	
Notes payable to relatives		0	
Notes payable to others		0	
Accounts and bills due		0	
Unpaid income tax		0	
Other unpaid tax and interest		0	
Real estate mortgages payable—add schedule (5)	95	850	
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	149	850	
Net worth	1088	510	
Total liabilities and net worth	938	660	

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor	no		
On losses or contracts	no		
Legal Claims	no		
Provision for Federal Income Tax	no		
Other special debt	no		

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)		no	
Are you defendant in any suits or legal actions?		no	
Have you ever taken bankruptcy?		no	

Schedule 1 - U.S. Government Securities

$30,000	Treasury Bonds (Dep. children)

Schedule 2 - Listed Securities

$306,500	U.S. Trust Co. Securities Acct. (spouse)
17,000	NVR L.P. stock com. (joint)
1,600	Interstate Gen. stock com. (joint)
1,620	Morrisons stock com. (dep. child)
31,200	McDonalds stock com. (dep. children)
8,200	UST Master Funds (dep. children)
$366,120	TOTAL

Schedule 3 - Unlisted Securities

$5,000 estimate	NOVO Industries (spouse)

Schedule 4 - Real Estate Owned

$341,340	Home in McLean, VA (joint)
65,000	Efficiency Condo in Tarpon Springs, Florida (joint)
$406,340	TOTAL

Schedule 5 - Real Estate Mortgages Payable

$95,850	Home mortgage

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Since 1983, my service as a judge has prevented my engaging in the practice of law in any fashion. Consistent with my judicial responsibilities, however, I have worked actively in organizations or groups seeking to improve the administration of justice, including prison conditions in the United States. For example, I served as a member of the Task Force on Prison Industries, an ad hoc organization formed by Chief Justice Burger to facilitate the development of meaningful training and vocational opportunities for prison inmates. In addition, I have served as a charter member of the Committee on Community Corrections, an ad hoc group of federal and state officials (and the broader legal community) seeking to foster, in an era of overcrowded prisons, public awareness of alternative means of punishment and incarceration. I have also served as chairman of the D.C. Circuit's Committee on the Bicentennial of the Constitution, which has sponsored educational programs related to the Constitution for the benefit of the general public (including students) as well as the bench and bar. Finally, I have been actively involved, including providing in-house legal services, with a non-profit corporation that provides housing for mentally retarded adults in Northern Virginia.

Throughout my work in private practice, I made myself available to handle pro bono matters. Shortly after joining the firm in Los Angeles (in 1974), I handled (successfully) a state criminal charge against an individual. The charge (grand theft auto) was dismissed prior to trial following negotiations with the Inglewood, California prosecutor. I also handled a landlord-tenant dispute for the same individual following completion of the criminal proceedings.

In Washington, D.C., I volunteered for the D.C. Bar's list of attorneys to handle pro bono matters. By referral from the bar, I was primarily involved in a sensitive, protracted domestic relations matter, including obtaining emergency injunctive relief by virtue of spousal abuse difficulties. Ultimately, the matter resulted in a divorce decree to my client's satisfaction.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion — through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

For a brief period (from Dec. 30, 1987 until resignation by letter dated March 31, 1989), I was an associate member, Lawyer's Club of Washington. The club is a social organization of lawyers and judges in Washington D.C. It has no place of business, license or the like. It meets periodically as a group for lunches, and has two dinners annually. Several months after joining the Lawyer's Club, I indicated to Chief Judge Howard Markey (U.S. Court of Appeals for the Federal

Circuit), who is likewise an associate member, that I would support informal efforts then underway to encourage opening the group to women. I have recently been advised by Chief Judge Markey that, in his considered view, no change in policy is likely to occur in the foreseeable future. I have therefore withdrawn from the group, in view of concerns over the appearance of a prospective officer of the Department of Justice serving as a member of a gender-exclusive organization of professionals.

Member, United Methodist Men, Trinity Methodist Church, McLean, VA., from 1978-present. I have no plans to withdraw from participation in the United Methodist Men. Each congregation of the United Methodist Church has a women's (United Methodist Women) and men's (United Methodist Men) organization dedicated to spiritual and social purposes. I am aware of no sentiment whatever that these time-honored, religious-related organizations are in any way inappropriate or improper, nor am I aware of any effort (or even any suggestion) within the United Methodist Church to disband such organizations.

[Whereupon, at 12:53 p.m., the committee was adjourned.]

CONFIRMATION HEARING ON: FERDINAND F. FERNANDEZ, SHIRLEY D. PETERSON, AND CAROL T. CRAWFORD

THURSDAY, MAY 11, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard Metzenbaum, presiding.

Also present: Senators Thurmond, Grassley, Humphrey, and Kohl.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. This hearing will come to order.

This morning, the Judiciary Committee holds its fourth hearing in the 101st Congress to consider nominations. I am delighted to chair this hearing. We will hear testimony today regarding the nomination of District Judge Ferdinand F. Fernandez to the Court of Appeals for the Ninth Circuit.

We will also hear testimony today on two nominations to the Justice Department. Shirley Peterson has been nominated to be Assistant Attorney General for the Tax Division. Carol T. Crawford has been nominated to be Assistant Attorney General for the Office of Legislative Affairs.

This is the first nominations hearing that I have chaired in the 101st Congress. I welcome the opportunity to chair this hearing and participate in the exercise of the advise and consent role of the Members of the Senate. I look forward to working with my Democratic colleagues and Republican colleagues as these hearings proceed forward.

The committee has traditionally considered judicial nominations before Justice Department nominations when both are on the same agenda. That is the order in which I intend to proceed today. As this committee has customarily done, we will hear first from Senators who wish to introduce the nominees. My colleagues are, of course, welcome to stay for the entire hearing; although we will certainly understand should they need to leave after their introductions.

Before we begin these introductions, let me note for the record that each of the nominees has completed an extensive questionnaire on his or her qualifications, experience, and financial situation. The publicly available portions of these questionnaire responses will be printed in the record of this hearing. We will also keep the record open for a limited time for follow-up questions to nominees and for additional questions that may be submitted by members of the committee who are unable to be present this morning.

We would also include in the record the complete introductory statements of Senators, including any who were unable to attend in person today due to scheduling conflicts.

Senator Wilson is here with us to introduce Judge Fernandez, who is a long-time California resident. Senator Packwood will be introducing Ms. Crawford, who served as the legislative assistant on his staff from 1969 to 1975. We are happy to have Representative Connie Morella, who I understand will be here shortly, to present Ms. Peterson.

I might say, parenthetically, that Senator Wilson, we will hear from him before Senator Packwood, notwithstanding the usual order of precedence around here based upon seniority, but that is because we hear from the judicial nominees first, and I would hope Senator Packwood would understand.

I am happy to see Senator Grassley is here with us this morning. Senator Grassley, do you have an opening statement?

Senator **Grassley**. I have no opening statement, Mr. Chairman.

Senator **Metzenbaum**. Thank you very much.

We will then proceed to hear from Senator Wilson.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator **Wilson**. Thank you very much, Mr. Chairman.

It is my privilege this morning to reintroduce Judge Fernandez to the committee. I had the first opportunity in 1985, when he was nominated for the district court.

Before we proceed further, though, I think he might wish to accord me the honor of introducing his wife, Priscilla, who is here with him this morning.

Senator **Metzenbaum**. Happy to have you with us.

Senator **Wilson**. Mr. Chairman, in his 4 years on the district court following 5 years of distinguished service on the State superior court, Judge Fernandez has earned the respect and the admiration of the public as well as his colleagues on the bar.

He has been prepared for his career on the bench by rather distinguished academic preparation. He earned an undergraduate engineering degree from the University of Southern California, where he was elected to Phi Beta Kappa. He also received his law degree from the University of Southern California, where he was a member of the Law Review and was Order of the Coif, and attended Harvard Law School to do graduate work on a graduate fellowship.

During his career, Judge Fernandez has been very, very active in the organized bar and in the California Judge's Association. He has particularly been interested in juvenile justice issues and has taught on this subject. Judge Fernandez has also published a great many Law Review articles on complex constitutional issues, including freedom of religion and equal protection, and some very practical issues such as fee arbitration.

In his practice, and on the bench, Judge Fernandez has had extensive experience in a broad range of legal issues. Also, his engineering background will bring with him a technical expertise of great significance in the ninth circuit, which is, of course, faced with a number of patent-related cases.

Mr. Chairman, I could go on at great length, but in deference to both you and Senator Grassley and my colleague, Senator Packwood, I think that the record in this instance speaks very eloquently for the character, the quality, and the performance that Judge Fernandez has given, and I think that it argues very eloquently for his elevation to the appellate court. I know that he is prepared to answer questions. So would I be.

I would add only that when I say that he is well-regarded among both his colleagues and those who have come before him as practitioners, I understate the case considerably. By character, as well as by intellect, he is, I think, an ideal judge, and it is with great personal pride and pleasure that I reintroduce him to this committee and urge that his nomination be confirmed.

Senator **Metzenbaum**. I very much appreciate your introduction of Judge Fernandez, Senator Wilson. It certainly is significant and strong support for his candidacy. We very much appreciate it and thank you very much for taking the time to be with us this morning.

Senator **Wilson**. Thank you, sir.

Senator **Metzenbaum**. Judge Fernandez, I am going to ask you to excuse yourself from the table at this point so that I may hear next from Senator Packwood and then from Congresswoman Morella, who has joined us, so that the Members of the legislative body may get on with their other responsibilities.

Senator Packwood, we are very happy to have you with us this morning.

STATEMENT OF HON. BOB PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator **Packwood**. Thank you, Mr. Chairman.

Mr. Chairman and Senator Grassley, I can think of few people that I am prouder to introduce to any committee than Carol Crawford. I met her over 20 years ago.

When I was elected to the Senate in 1968, I began to receive a plethora of applications for jobs. I was involved in a recount in my election, so I sent a friend of mine to Washington to just sift through the applications and take out what he regarded as the best ones. He came back absolutely exuberant about one person—Carol Tallman, now Carol Crawford.

When I came back, I interviewed those that he had screened out and he clearly had assessed it correctly because she was far and away the most outstanding applicant of all the people we had. She came on my staff in January 1969, and she remained my senior legislative assistant and legislative director through 6 years. I attended her wedding in New Jersey in 1970. I remain good friends with Carol and her husband, Ron. Georgie and I have been guests in their home many times; they in our home many times.

But I most remember the day in 1975 when Carol came in and said she was quitting. I thought, oh, dear, something has gone wrong in the office. And she said, "I have had it with them." And I said, "With whom?" And she said, "The executive branch." She said they are obdurate; they are hidebound; they are irrational; they are intractable. You cannot deal with them and there has got to be a better purpose to life than dealing with them.

At the time, she was handling my hospital and medical issues and trying to deal with the departments with jurisdictions over those issues. So, she left.

Senator **Metzenbaum**. It has not changed. [Laughter.]

Senator **Packwood**. Carol left and went off to American University Law School where she graduated magna cum laude. Then she practiced law for a short period of time, and of course, I kept in touch with her all the time, and with her husband. After the Reagan election, she shows up on the transition team for the Federal Trade Commission. I said, "Now, Carol, you remember about the executive branch." And she said, "Well, this is just a transition. Besides, the FTC is an independent agency. It is not the executive branch."

The next thing I know, she becomes the assistant to Jim Miller, who was the Chairman of the Federal Trade Commission. And a little later on, after a couple of years as his principal assistant, she became the Director of the Bureau of Consumer Affairs, which is one of their principal bureaus.

And then Carol went over to the Office of Management and Budget in 1985. There, her portfolio included the Justice Department, the Treasury Department, the Transportation Department, Commerce, Housing and Urban Affairs, the Small Business Administration, the Federal Emergency Management Administration, the SEC, the ICC, the Federal Maritime Administration Commission, all of the financial regulatory agencies, the Postal Service, and other small agencies. She was responsible for coordinating their budgets and for preparing OMB's papers for the President on these agencies. Carol remained at OMB until her very recent selection for nomination as an Assistant Attorney General for Legislative Affairs.

So, for the last, at least, 8 years, if you want to count independent commission service, she has been back in a branch of government that she found some failings in years ago. But I can assure you, Mr. Chairman, that she has none of the failings that she found in some of her predecessors in some of the executive agencies.

There is no smarter person; there is no more gracious person and very honestly, there is not a better friend that my wife and I have than Carol and her husband. I am delighted to present her to you as the nominee for Assistant Attorney General for Legislative Affairs.

Senator **Metzenbaum**. Senator Packwood, can I be assured that by reason of your close relationship with Ms. Crawford, that on issues of where we may have had some differences in the past with the administration, some which have had a rather high profile, that you will be able to prevail upon Ms. Crawford to bring us a better message from the administration than we have received in the past on those issues?

Senator **Packwood**. I could prevail upon Ms. Crawford to bring us a better message. I am not sure I can prevail upon the administration to give a better message to her.

Senator **Metzenbaum**. We do not care what they say. [Laughter.]

We very much appreciate your presentation. It is certainly an extremely strong recommendation and we have great respect for you. I am certain that this committee will take that into consideration as we deliberate on this nominee.

Senator **Packwood**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. Senator Grassley, any questions?

Senator **Grassley**. No.

Senator **Metzenbaum**. Thank you very much. Thank you for being with us, Senator Packwood. Ms. Crawford, if you would be good enough just to stand aside for a moment—I might say, Ms. Crawford, do you have anybody from your family here with you that you care to introduce?

Ms. **Crawford**. No.

Senator **Metzenbaum**. No? OK, thank you.

Our next congressional authority is Representative Constance Morella of Maryland. We are very happy to have you with us.

STATEMENT OF HON. CONSTANCE A. MORELLA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Ms. **Morella**. Thank you, Mr. Chairman, Senator Grassley.

There are many pleasures in being a Member of Congress, and this is indeed one of them, to be able to introduce to this very distinguished and important committee a woman in whom I have such confidence and I know will serve the public well, who is also a constituent.

D'Tocqueville, back in 1835, when he talked about democracy in America, commented on the people he felt were the most important in American society, and he came to the conclusion that, it was not aristocracy and those that were prominent in other professional circles; rather, it was the lawyers. He talked about the power and the influence of attorneys and judges and the importance of our administration of justice.

And I am reminded of that, particularly as I introduce to you Shirley Peterson, who is the nominee for Assistant Attorney General for Tax. Shirley Peterson has had a very prominent career—educationally and in terms of experience and in terms of commitment. She is a graduate of Bryn Mawr College. She received her A.B. degree in 1963 and it was cum laude.

In 1967, she then went on to law school and she received her law degree from New York University, cum laude. She was awarded scholarships at both Bryn Mawr and New York University. She was a New York University honor scholar, a member of the Order of the Coif.

So, she has quite an educational background in which she has demonstrated her ability and the fact that she has worked hard. She is most distinguished.

She has been a tax lawyer for almost 20 years with the law firm of Steptoe and Johnson in Washington—nearly 20 years of experience—and she has been a partner in that firm since 1978. She has also been very active in community activities and professional activities. She has been active in the tax section of the American Bar Association. She served on the Assistant Attorney General's Advisory Committee on Tax Litigation from 1982 to 1984.

I could go on with her credentials, but I know that you have them before you and you will have an opportunity to find out more from her. Speaking engagements as a public service in the area of taxation have been numerous. She has been able to fit almost two a month into her schedule. She has published widely. She has been engaged in many, many other professional activities.

I firmly believe that Shirley Peterson has the talent, the experience, the temperament, and the dedication to represent us and our country exceedingly well. And so, in introducing her to you, I am reminded of a quote from Shakespeare, where he said at one point, "Those about her, from her shall learn the perfect ways of honor."

So, it is with great pleasure that I introduce to you, for the confirmation hearing, Shirley Peterson.

Ms. PETERSON. Thank you very much.

Senator METZENBAUM. Thank you very much.

Ms. MORELLA. And her husband is here, also, Mr. Peterson. May I introduce him to the committee?

Senator METZENBAUM. Very happy to welcome you, sir.

Ms. MORELLA. Behind every good woman is a good man. Thank you very much.

Senator METZENBAUM. Thanks a lot and we appreciate your strong recommendation. It certainly will be taken into consideration by the committee. We also appreciate your strong support of the Brady bill in the House.

Ms. MORELLA. Thank you.

Senator METZENBAUM. I would like to ask the three nominees to be good enough to stand at this point. You can stand at your seats.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge FERNANDEZ. I do.

Ms. CRAWFORD. I do.

Ms. PETERSON. I do.

Senator METZENBAUM. I just want to apologize to my colleagues. I did not ask if you had any questions of——

Senator GRASSLEY. I did not have any questions, Mr. Chairman.

Senator METZENBAUM. I overlooked it. I am sorry.

Judge Fernandez, we are happy to have you with us here this morning. I will say to each of the three witnesses that we would expect a short opening statement, if you care to make one. If you do not care to make one, that is your privilege, of course, as well.

Judge Fernandez, please proceed. Do you have an opening statement you care to make?

Before you do so, Senator Thurmond has joined us. Senator Thurmond, do you have any opening statement you care to make?

Senator THURMOND. I do not have an opening statement, no. I am just glad to see you go ahead with these nominations and commend you for it.

Senator **Metzenbaum**. I always do what you tell me to do, Senator Thurmond, and I will continue to follow those precepts as I serve in this body, as has been my past procedure. In fact, in some instances, it has. [Laughter.]

Judge Fernandez, happy to have you proceed at this point.

TESTIMONY OF HON. FERDINAND F. FERNANDEZ, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT COURT OF APPEALS

Judge **Fernandez**. Thank you, Senator. I did not prepare any opening statement for this hearing. Since you give me an opportunity though, I would like to simply say, for the record, that I appreciate the President having nominated me and I appreciate Senator Wilson having been here, and I greatly appreciate the committee being willing to hear from me this morning.

I think having said that I will stop.

Senator **Metzenbaum**. Thank you very much. Did you finish your statement?

Judge **Fernandez**. Yes, sir.

Senator **Metzenbaum**. Let me ask you a couple of questions.

You presided over Cornwell versus City of Riverside. That was a civil rights case brought by a pregnant woman who had been struck in the stomach by a police officer. You wrote that there was "ample evidence" to enable the jury to determine that Ms. Cornwell had been struck brutally and unnecessarily.

You also upheld the jury's finding that Ms. Cornwell had been subjected to a degrading invasion of privacy by a male police photographer. Nevertheless, you significantly reduced the punitive damages awarded by the jury from $327,000 to $45,000, stating that, "this was hardly the most egregious case of police misconduct" that you had seen or read about.

Judge Fernandez, I am curious. How do you sit there on the bench and determine that this woman, who was brutalized—the jury had concluded that it obviously was a very strong case—how do you determine when you, as a judge, should substitute your judgment of egregiousness for the jury's determination? How do you conclude that it ought to be $45,000 instead of $327,000?

Judge **Fernandez**. That is a good question.

Senator **Metzenbaum**. Now give me a good answer.

Judge **Fernandez**. I will do my best. The thing that I should mention in this particular case, while I thought the behavior of the police was, frankly, shocking, the physical damage that was done was almost none. That is to say, there was not even a mark to indicate it. Now, I still think it is a shocking thing to do, what they did, and I thought it was particularly shocking and insensitive for them to send a male police officer to take a photograph of this lady.

The case, as it was presented, however, indicates that the punitive damages in this case, I was assured by all counsel involved, were the highest that had ever been levied against police officers for any kind of brutality they had committed, and were the highest by far. That was particularly mentioned to me by plaintiff's counsel, who is a very well-known and very aggressive civil rights lawyer in this area, a gentleman by the name of Yagman.

Punitive damages, of course, are not intended to be compensatory. They are intended to be a punishment against the police and they are supposed to have some relationship to what is necessary to send those people a message and tell them to be better people in the future.

In terms of how you make that decision, it is a very difficult alchemy, I have to admit. The jury is not told much about how it makes a decision and we are not told much more. But taking all the information I had about other cases and other punitive damage awards, it seemed to me that the amount that I ultimately said should be awarded was a proper amount to send a message to these police officers to pay attention to people's constitutional rights without sending, you might say, a really punitive blow to try to crush them economically.

I might say, if it is of any significance, the plaintiff's counsel was so pleased with it all, he published a part of my comments to that regard, and I believe he sent a copy of the opinion to Senator Biden, along with a letter, saying this indicated that I had a proper attitude toward people's——

Senator METZENBAUM. You had what?

Judge FERNANDEZ. That I had a proper attitude toward people's civil rights. So, I can only tell you, I cannot give you an easy answer to it, but it seemed to me, under all the evidence, that that was the appropriate award.

Senator METZENBAUM. Well, in that case, you gave the plaintiff the choice of either accepting the amount of the punitive damages or initiating a new trial on all the issues.

If you thought that the punitive damages award was excessive, could you not have ordered a retrial on that issue alone, rather than make the plaintiff choose between accepting the amount you deemed proper or risking a retrial on all of the issues?

Judge FERNANDEZ. I think that is a possibility. The difficulty is that, in the first place, it was a relatively short trial. In the second place, one would really have to retry the whole case again, in any event, and it would be very difficult to separate the issues.

It seemed to me that in fairness, if the matter were going to be retried, the whole case ought to be retried and the whole matter decided by a single jury. That was the reasoning. That is what is normally done in these kinds of cases.

Senator METZENBAUM. You could have sent it back for reassessment of damages without—that would have been within your authority.

Judge FERNANDEZ. I think that is true.

Senator METZENBAUM. Now, in the *Usher* case, which was reversed by the ninth circuit, you dismissed two of Mr. Usher's civil rights claims on the grounds that they did not allege racial animus. Mr. Usher, however, alleged in his complaint that in the course of his arrest, he was physically abused by police officers who hurled specific racial epithets at him.

How do you reconcile your holding with these facts?

Judge FERNANDEZ. That particular case was—I hate to put it this way—a very technical pleading kind of problem. What occurred in that case, as I recall, I had granted motions to dismiss with leave to amend on two occasions before I granted the final motion to dismiss. It seemed to me—and what I told counsel, let us say, on the first grant of the motion was that I agreed that hurling racial epithets at anybody period is inappropriate.

His particular pleading did not link the racial epithet to an allegation that what was done was done based on a racial animus and I said to counsel, look, if you can plead that the racial epithets were something more than just a nasty comment—for example, if somebody is arresting me and calls me an SOB, I do not assume necessarily that calling me an SOB is intending to say I am arresting you because you are one. I consider it a very nasty, unpleasant comment to make to me.

What I told counsel was, look, go back and plead for me that what was done was done for racial animus.

Senator METZENBAUM. Do you not think that the mere fact of calling somebody a nigger, a Jew—I do not know what kind of term you might use with the Catholic—a mick, if you are Irish; a dago if you are Italian; a spic, if you are of Spanish extraction—do you not think that that kind of term, in and of itself, indicates some animus?

I mean, it certainly is a disparaging term. It is a term that you use in looking down at somebody, and I wonder whether or not the law requires proof that somewhere in the head, there is some animus that is there more than is self-evident by the use of the term itself.

Judge FERNANDEZ. Well, let me answer this way. I told counsel, just put in a phrase that says that what they did was done against him because of his race and you will have pled it. And counsel declined to do that. Now, let me say this. Since the ninth circuit has ruled, I am perfectly willing to accept the proposition that simply calling somebody a sexist, racist, or whatever name, is sufficient to plead because of action. If you just prove that, you have also proved the cause of action.

At the time, I wanted counsel to give me a phrase that would link it and counsel simply refused to do that. I assumed that he had some reason that he honestly could not link it.

Senator METZENBAUM. The circuit court of appeals apparently agreed with him.

Judge FERNANDEZ. Sure did, and that just proves that I am not right all the time and I am willing to accept that.

Senator METZENBAUM. Now, in that same case, you ruled that another civil rights claim brought by Mr. Usher was barred by the statute of limitations, even though he had no notice that a Supreme Court decision shortening the limitation period would be applied retroactively.

What was the rationale for that decision? And let me ask you, just parenthetically, did you yourself have a little feeling of uncomfortableness with Mr. Usher as the plaintiff, where you were looking for some way to bar him from proceeding forward with his claim?

Judge FERNANDEZ. Absolutely not, Senator. I think if a judge felt that way, he is not doing his job right.

Senator METZENBAUM. He what?

Judge **Fernandez**. He would not be doing his job properly because my personal feelings, if I had them, if I could not set them aside, you could properly raise a question.

Senator **Metzenbaum**. What was the rationale for your proceeding as you did in connection with this question of the statute of limitations?

Judge **Fernandez**. The thing I should make clear, or try to clarify as best I can is, if one reads the court of appeals' opinion, it appears that it can be read to say that what I determined was that here is some poor person who is waiting for a 3-year statute of limitations to run, 1 year has already run, the Supreme Court changed the law and I said, well, that is just too bad. You are stuck with the 1 year and you do not get to file your case.

There really are three possibilities. You can decide the statute applies that way, retroactively, or you can decide it is entirely prospective, or you can take a third position and that is, if the ruling comes down the day before the statute is going to run, it is not fair to bar him, for example. If it comes down 364 days before the statute is going to run, then it is proper to bar him.

In other words, as is often done with the legislature, you have a reasonable time to file your case. In his particular case, what I decided was that the rule we ought to apply was this rather sliding scale—look at all the facts regarding the particular case.

The Supreme Court's decision was made 6 months before the filing of the case would run out, even on a 1-year statute of limitations. I determined that 6 months was too long a wait. On reflection again, I think that it is better to have a bright line rule and my sliding scale concept is not a solid enough idea.

I think if you are going to pick a bright line rule, then I can pick the right one because to have absolute retroactivity that would cut people off with no opportunity to file, I think, would be totally unjust and I would not make such a ruling and I did not.

Senator **Metzenbaum**. Judge Fernandez, the next question I am going to ask you, I am going to ask Senator Thurmond to stay with me on this one because it is a matter which we have discussed in our committee before.

Prior to becoming a State court judge in 1980, you were a member of the University Club in Claremont, CA. You have indicated this club did not admit women and that you made efforts to get the club to change its policies.

Could you describe in detail the efforts which you made and when you made them?

Judge **Fernandez**. I am afraid I cannot tell you all the dates.

Senator **Metzenbaum**. No, I do not want the dates. Just give us a general review.

Judge **Fernandez**. I would say commencing within 2 or 3 years, or a couple of years after I was in the club—I was in the club for about 15 years—I and some other members of the club, notably a gentleman by the name of Stephen Zetterberg, presented petitions to have the club put up a ballot to the members that the policy should be changed.

We tried to do that on a number of grounds, one of which was strictly prudential, frankly, as an argument. They wanted desperately to be able to have their club quarters on the premises of the

Claremont Colleges and the colleges, wisely enough, said we will not do that unless you eliminate that policy.

The other grounds are that I think it is just plain wrong and silly to discriminate against women in that fashion. So, we tried to do it.

Senator **Metzenbaum**. Is there any fashion in which it is all right to do it?

Judge **Fernandez**. Excuse me?

Senator **Metzenbaum**. Do you think there is any fashion in which it is all right to discriminate against women?

Judge **Fernandez**. Not that I have heard of.

Senator **Metzenbaum**. I know you did not mean to leave that hanging out there and I just——

Judge **Fernandez**. No, I sure did not. [Laughter.]

Nor anybody else, to tell you the truth.

We brought it to a vote, my recollection tells me, on four or five occasions. I read a newspaper article a few months ago that said it was only on three or four occasions. We brought it to a vote and every time, it was voted down. The interesting thing about that is that the folks in the club were mainly retired ministers and such, who one expects to have fairly broadminded views.

But in any event, they voted it down every time on various grounds, after a lengthy debate in the club itself. That went on. I think the last occurrence was maybe a year before I went on the bench, or within the year before I went on the bench.

When I went on the bench, I sent the club a letter within a few months and said, I am resigning because whatever might be appropriate for private people in private clubs, it certainly is inappropriate for a judge, a person in public life and particularly a judge, to be a member of a club that has that kind of policy. And that is it.

Senator **Metzenbaum**. Judge Fernandez, let me commend you for your actions, and I want to say publicly, that had you opted not to resign, I would not opposeclub makes every effort possible to change the club's policies, then it perhaps serves the purposes of nondiscrimination, to keep that individual in the club, not to force him or her to resign in order to bring about a change in the club's policies.

So, my view is that those who come before us and resign from a club 1 week, 1 month or 2 months before they get appointed or nominated by the President to be a member of the judiciary, that that really does not say very much about the individual.

I think that you did what any decent American should do and that is, you were in the club, you fought against the continued practices. You did not prevail, but we cannot hold you responsible for that. I just want to say publicly that I very well may address this issue on the floor of the Senate when your nomination is up, but not in a critical manner, but rather, in a commendatory manner.

I think that I have some difficulties with a couple of your decisions, but in connection with your conduct as a member of that club, I think your conduct was excellent. As I said before, if you had not opted to resign, I still would have thought it appropriate that this Senate did not make that a bar to your confirmation.

Judge **Fernandez**. Thank you, Senator.

Senator METZENBAUM. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Fernandez, we are glad to have you here. I want to congratulate you on your appointment by the President and having an endorsement by the appropriate people.

Judge Fernandez, one of the criticisms of judicial activism is the tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals.

Do you feel that this criticism is valid and would you please explain your answer?

Judge FERNANDEZ. Well, I think it is a valid criticism if judges are using people as means of fostering their own point of view as a social policy and simply using the people before them as pawns in that policymaking, if you will. I think that is inappropriate. I do not think judges should do that, in general.

I think what judges have to do, as best they can, is to make their decisions based upon the principles that are in the law, regardless of what their particular view might be regarding policy or social policy. I think they are bound to do that and they must do that. That is the way I try to make decisions.

Senator THURMOND. Some judges have taken over hospitals; some have taken over prisons; some have taken over schools. That is not judicial function. The judge's job is to interpret the law. Do you understand that?

Judge FERNANDEZ. I certainly do, Senator, exactly.

Senator THURMOND. It is a lawmaking body, whether it is a city council or a county commission, State legislature, or the Congress. They make the law. The judges only interpret the law. And sometimes, because the legislative body does not do what some people think is best for the public, they tend to correct that and attempt to make laws, and you have got no business doing it.

Judge Fernandez, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judget interprets it? In other words, would you follow an appeals court above you, circuit court and Supreme Court, although you may have a different public opinion or a different personal opinion?

Judge FERNANDEZ. I certainly would. I think even if I had a different point of view, I think not only stare decisis, but just proper judicial deference means that, for example, as a trial judge, I follow what the appellate courts tell me the law is. Actually, my personal opinion, I think, is not very important in general.

It is my obligation, I think, to see what the law says, what the law requires. That means looking at all of the law in any particular case. I might read the Constitution one way and if the Supreme Court has told me that is not the right reading today, I will follow what the Supreme Court says. I think I am required to.

Senator THURMOND. I want to mention this, too. A Federal judge has all the power in the world. There is nobody that I know of in this country that has more power than a Federal judge. You have got the power of life and death. You have got tremendous power.

But there is no use to flaunt that power. I have seen some Federal judges embarrass lawyers, embarrass witnesses, embarrass jurors. To me, that is inexcusable. How do you feel about that?

Judge **Fernandez**. I do not think the way a judge behaves on the bench is any different from the way he ought to behave, let us say, in social situations. I think you should treat everybody with respect. He should treat everybody with dignity. By the way, I think that is even true of convicted felons who have committed some crime that we think is terrible. I think you treat them with respect and dignity. You have to maintain a proper courtroom. You cannot have people running up the walls and things like that.

The interesting thing I have found is that if you treat people with dignity and respect, they treat you the same way. I have never held anybody in contempt in my court. I have never had a need to do it. I think you just treat them like human beings and that is the way we should all be treated all the time, I think.

Senator **Thurmond**. Now, on this matter of joining clubs. A great many people have a different view. I realize the American Bar Association says you cannot discriminate, but I am not too sure it is discrimination in private clubs. A lot of people are not sure of that, simply because the American Bar has taken that position.

I have got two boys and two girls. I want to see those girls have every opportunity as those boys. I do not want to see them discriminated against. But would it be wrong, for instance—I will not ask you the question—but in general, is it wrong for women to have their own clubs to discuss female problems if they want to? Should men be forced to join that club or you could not keep them out? I am not too sure sometimes, we are not going too far in some things. Or if men wanted to have a club of their own.

There is a great deal of difference of opinion on those things. Now, if it is discrimination certainly. that might be a different thing. For instance, even maybe the Rotary Club. If women wanted to join that, they probably should be allowed to do so, or the Lion's Club, like that. But just a purely private club, if they want to have it men have it or women have it, I have got a lot of questions in my mind as to whether that is discrimination or not if they do not admit the opposite sex.

I just wanted to throw that out. The chairman may not agree with that, but a lot of people in this country are beginning to feel the Federal Government is trying to encroach on their private lives in trying to tell them what they can do in everything they do. And a lot of people are getting sick and tired of the Federal Government trying to enter every facet of people's lives.

You do not have to answer that.

Judge **Fernandez**. Thank you.

Senator **Thurmond**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. I am going to get Mrs. Thurmond and the two daughters to come down to respond to that, and my four daughters and wife as well. [Laughter.]

Thank you very much, Judge Fernandez.

Oh, I apologize. I apologize abjectly. Senator Kohl, we are delighted that you are here with us. I do not know if you heard all the witnesses as they were introduced earlier, but if you have any questions of Judge Fernandez, please proceed. But I apologize once again.

Senator KOHL. No problem.

Are you a friend of Senator Wilson, Judge Fernandez? You know him? What is your relationship with him?

Judge FERNANDEZ. I have watched his career very carefully in California. If you mean by a friend of being——

Senator KOHL. I just wonder what the nature of your relationship is.

Judge FERNANDEZ. I just know him and he knows me and I think he has had people indicate to him that he ought to be supportive of me. But in terms of being very close——

Senator KOHL. I am just curious to know generally how these nominations occur. They probably occur in every State and for every sort of a nomination—a different condition exists or comes to pass that results in a nomination. I am sure all of them are proper.

I just wondered how it is that he decided to nominate you. Is there a reason for it, in addition to the fact that you are qualified? I am assuming that is true. But there are other people who are qualified.

Judge FERNANDEZ. Absolutely.

Senator KOHL. So, why do you think he centered upon you as a nominee?

Judge FERNANDEZ. You are forcing me to balance arrogance against—seriously—

Senator KOHL. We are taking the fact that you are well-qualified. I am sure that is true. But as I said, I would assume that there are other people who were equally or probably as well-qualified. Or if you do not think so, say so. I am just curious to know why you——

Judge FERNANDEZ. I hope you will believe me when I tell you that I do not know. I had no direct contact from Senator Wilson's staff or people before the time the nomination was made. So, I honestly do not know. I am delighted to be a beneficiary of it. I hope it was because he thinks I am awfully good, although I am not saying I am awfully good. I hope it is that he thinks I am. But I honestly do not know the answer to your question.

Senator METZENBAUM. Senator Kohl, I might make an observation to you that both with the Republican administrations and the Democrat, circuit court of appeals judges are pretty much the prerogative of the President as distinguished from district court judges where, pretty generally, the President takes the recommendations of the Senator in that particular area.

I just asked Senator Thurmond what the procedure is for the Republicans and he said that Senators can make recommendations, but they do not have nearly the same standing that we do when it comes to a district court nomination. I am not at all certain whether Senator Wilson, in this instance, recommended you or whether his support came about subsequently. Do you know, Judge Fernandez?

Judge FERNANDEZ. That is what I honestly do not know. I know his support came about subsequently. Whether he had made the initial recommendation—well, let me back up. You know that President Reagan nominated me previously to the ninth circuit.

I do believe that Senator Wilson's support, his supporting position occurred between the time of that nomination and between the time that President Bush nominated me. But if the question is how did the nomination come about and how did that support come about, again, I honestly do not have an answer to that.

Senator THURMOND. I might make this observation, Senator. The President has the power to nominate whom he pleases. He does not have to listen to anybody. On the circuit courts, when it involves more than one State, he will consider any recommendations made by anybody. On the district judges, he has, as the distinguished chairman just said, he does consider the recommendations very carefully of the Senator, especially if he belongs to the same party as the President.

Now, he does not have to, but it has been customary that he will give more consideration in district judges to the feelings of the Senators than he does to circuit judges in appointing circuit judges. So far as knowing anybody personally, I do not think it makes any difference if he is a close friend of his.

In fact, in appointing judges, I imagine most of the Senators would first consider if the individual is qualified. That is the first consideration. Next is, everything being equal, I imagine he would recommend a friend of his. That would be natural.

Senator KOHL. I was just curious to know what the relationship was. I did not cast any negative aspersions on it.

Senator METZENBAUM. And I might say, Senator Kohl, that neither Senator Thurmond nor I wish to interrupt your line of questioning, but I thought, since you are new here, we might just comment on this difference between the CCA appointees and the district court judges.

Senator KOHL. Thank you, Mr. Chairman.

Judge Fernandez, one of the special qualities that a judge must have is the ability to put aside deeply held personal beliefs in order to apply the law and the Constitution fairly and equitably to all litigants that come before him.

What does a judge do about a deeply held moral conviction, which in your opinion may be pertinent to a matter before the court?

Judge FERNANDEZ. Well, I think that a judge has to put that aside. Now, you can look at times in our history when that has presented some extraordinary problems for judges. But I do not believe that a judge, for example me, should have the hubris to decide that his moral belief ought to become the law for the people and society, whether the people like it or not.

So, I think my obligation is, at all times, to put aside my personal moral beliefs and to adhere to what the society has adopted as its law and as its principles and as the grounding of its laws and principles.

Now, I can imagine that it would be possible for a judge to come to a point that his morality simply precluded him from making the decision that the law required him to make. I think what he has to do then is resign.

Senator KOHL. OK. Judge, as you know, the full panel of appeals court judges occasionally reviews a decision made by a panel of three judges. When do you think such a review is proper and why?

Judge **Fernandez**. Not having been an appellate court judge, I really do not know enough about that particular process to give anything that I would consider a terribly intelligent opinion about it. I would think though that particularly when the law is getting in disarray in the circuit, where one panel is going one way and one panel is going another way, that that certainly is an appropriate time for the circuit to commence an en banc kind of proceeding and get the law straightened out.

It is very important for people to know precisely what law is going to be applied to them. Sometimes, it is more important to know precisely what the law is than to know which way it is going to be. Just to know it is going to be one way is the most important thing.

Senator **Kohl**. OK. Thank you, Judge.

Senator **Metzenbaum**. Thank you very much, Senator Kohl.

Judge Fernandez, just a couple of questions for my own edification, having nothing to do with your confirmation. What does simulacra, s-i-m-u-l-a-c-r-a, mean?

Judge **Fernandez**. Sorry?

Senator **Metzenbaum**. Simulacra.

Judge **Fernandez**. I am very sorry.

Senator **Metzenbaum**. Simulacra. S-i-m-u-l-a-c-r-a.

Judge **Fernandez**. I am sorry. Surely. It is like a very light sketching or something that is similar but not quite the same. A light reproduction, for example.

Senator **Thurmond**. It is a good thing you knew. The rest of us did not.

Senator **Metzenbaum**. I am telling you. I do not. [Laughter.]

Tell me, what does teleological, t-e-l-e-o-l-o-g-i-c-a-l, mean?

Judge **Fernandez**. It means purposive.

Senator **Metzenbaum**. It means what?

Judge **Fernandez**. Purposive. In other words, the law does not just exist out there. When you have a law, there is a purpose to it and the purpose, as some philosophers say, is to help order society. So when you folks pass a statute, you are not just passing a statute to pass a statute. You are doing it because there is a reason and the reason is to help us have a better society.

Senator **Metzenbaum**. What does epopt mean, e-p-o-p-t?

Judge **Fernandez**. That is an interpreter of sacred mysteries.

Senator **Metzenbaum**. A what?

Judge **Fernandez**. An interpreter of sacred mysteries.

Senator **Thurmond**. Are those English words or Spanish words? [Laughter.]

Senator **Metzenbaum**. What I want to know, Judge, is where did you learn this broad-based vocabulary, because I am using words that have been used in your opinions and I share with Senator Thurmond a view that we are glad you know because I did not know what simulacra is or epopt, and I thought I had a reasonably good vocabulary. How did you broaden your vocabulary so much?

Judge **Fernandez**. I am not entirely sure, but one way is, I read a—there is a writer by the name of John Gardner, who wrote a number of novels, and every time I would read one of his novels, I would find 40 words that I had never seen before in my life and I would look them up and learn them.

Senator **METZENBAUM**. Good. I have no further questions.

Senator **THURMOND**. I want to ask you again. Are those English words or Spanish words? [Laughter.]

Senator **METZENBAUM**. They are English words.

Judge **FERNANDEZ**. I cannot tell you the derivation, but they are supposedly English.

Senator **THURMOND**. Well, we learn things every day, do we not?

Senator **METZENBAUM**. How many languages do you speak, Judge?

Judge **FERNANDEZ**. Honestly, just English.

Senator **THURMOND**. You know Spanish, do you not?

Judge **FERNANDEZ**. Excuse me?

Senator **THURMOND**. You speak Spanish, do you not?

Judge **FERNANDEZ**. Well, I ought to speak Spanish, but it is a long story of why I do not, but I do not.

Senator **METZENBAUM**. I want to tell you when it is a devil of a day when we—I gather you are of Hispanic extraction—it is quite a day when we get a jurist of Hispanic extraction who has such a fantastic English vocabulary but does not speak Spanish. So, both parts of that sentence are a surprise to us, but really, I do not believe they have any relevance as to whether or not you should or should not be confirmed. But it is somewhat of a surprise to Senator Thurmond as well as myself.

Thank you very much for being with us.

Judge **FERNANDEZ**. Thank you, Senator. Again, thank you for hearing me. I do appreciate it.

Senator **METZENBAUM**. Our next nominee is Shirley Peterson, the Assistant Attorney General of the Tax Division at the Department of Justice.

Senator **THURMOND**. Mr. Chairman, I have got to go to the Labor Committee to introduce somebody there. You will excuse me and I would just like to say, I know Ms. Peterson. We have looked into her record carefully. We feel she is well-qualified and I would like to say now that I will certainly support her nomination.

And the same thing about Ms. Crawford. She will be coming up next, I believe. We feel both these ladies are well-qualified and I am delighted that the President has seen fit to choose these fine women for these particular positions.

Senator Simpson has a statement on Carol Crawford and I would ask that be placed in the record.

Senator **METZENBAUM**. Without objection, it will be included in the record.

[The statement of Senator Simpson follows:]

STATEMENT OF SENATOR ALAN K. SIMPSON ON THE NOMINATION OF CAROL T. CRAWFORD

Mr. Chairman, it is a real pleasure to see you proceed with this hearing on the nomination of Carol Crawford to be an Assistant Attorney General of the United States. Carol has the trust and confidence of the President and the Attorney General as evidenced by this nomination as the Assistant Attorney General for the Office of Legislative Affairs—an office which is of such great importance to use here in the Judiciary Committee.

The Office of Legislative Affairs is involved in every single matter which comes before this committee. We have come to rely heavily on the expertise and assistance which the office provides as a liaison between our committee and the Department of Justice. Consequently, it is always in our best interest to thoroughly review the qualifications of the individual whom the President nominates as the Assistant Attorney General for this job.

I have come to know Carol Crawford over the years and I have found her to be extremely capable and professional in all of my dealings with her. She has an impressive record of achievement from her days following her magna cum laude graduation from law school, as an associate in a law firm, with the Federal Trade Commission, and with the Office of Management and Budget. She has recently taken on the post of Acting Assistant Attorney General. Carol's experience in government precedes her law school days. She is certainly no stranger to the Hill. She has worked for the Congressional Quarterly, for two congressmen and as a legislative assistant to our good friend and colleague, Senator Packwood. That experience on the Hill will certainly again be useful to her as she takes on this important new assignment.

While in the Office of Management and Budget, Carol acted as Associate Director for Economics and Government. As part of that job, she had regular contact with the Department of Justice and she is well aware of its internal workings and the importance of its mission. I am so very confident that she will serve admirably in this new capacity and I look forward to her quick confirmation. I might add a personal note that I have also come to know her husband, Ron. I have enjoyed my experience with both of these talented individuals and I eagerly look forward to the continuation of that relationship with Carol in this new capacity which she is about to assume. Thank you for allowing me to make these brief remarks, Mr. Chairman.

Senator THURMOND. And if there is no objection, I would like them to answer a couple of questions I have for each one of them for the record. If you will excuse me now?

[The questions of Senator Thurmond along with responses follow:]

QUESTIONS FROM SENATOR STROM THURMOND

FOR

SHIRLEY D. PETERSON, OF MARYLAND,
TO BE ASSISTANT ATTORNEY GENERAL, TAX DIVISION,
DEPARTMENT OF JUSTICE

QUESTION: Mrs. Peterson, the primary functions of the Tax Division are to aid the Internal Revenue Service in collecting the Federal revenue and to establish principles of law which will serve as guidelines to taxpayers and their representatives as well as to the Internal Revenue Service. The Tax Division usually works closely with the Chief Counsel of the Internal Revenue Service in deciding which tax cases to bring. How do you view the relationship between the Tax Division of the Department of Justice and the Internal Revenue Service in the area of litigation policy?

ANSWER: Close cooperation between the Tax Division and the Chief Counsel of the Internal Revenue Service, the Assistant Secretary of the Treasury for Tax Policy, and, of course, the Commissioner of Internal Revenue is imperative. We need to pursue common goals in administering the tax laws and in deciding which cases to bring and to prosecute on behalf of the Government. I look forward to maintaining a strong and productive relationship with the Commissioner, Chief Counsel, and Assistant Secretary of the Treasury. In partnership with them, I hope to improve tax administration in this country during the next few years.

QUESTION: Mrs. Peterson, the Criminal Investigation Division of the Internal Revenue Service has over the years done a commendable job in their effort to deter criminal activity particularly in the area of organized crime, white collar crime and narcotic trafficking. I am concerned, however, that insufficient assistance and support is provided to special agents of the Criminal Investigation Division. Would you please give me your comments on what you see as the role and importance of the criminal investigators of the Internal Revenue Service and their contribution to your Division?

ANSWER: In my opinion, the unit headed by the Assistant Commissioner for Criminal Investigation is one of the nation's premier investigative resources. The investigations conducted by CI are vitally important not only to improving general tax enforcement, but to combatting organized crime, white collar crime, and, in particular, drug trafficking.

I have been informed that in recent years, the Division has taken steps to increase both the quality and level of the assistance it provides to CI special agents in particular cases. All Criminal Section line attorneys also regularly travel to the field to work on particular cases. Within the constraints of the budget that this Congress provides me, I intend to do everything within my power to maintain and increase that support.

QUESTIONS FROM SENATOR STROM THURMOND

FOR

CAROL T. CRAWFORD, OF VIRGINIA,
TO BE ASSISTANT ATTORNEY GENERAL,
OFFICE OF LEGISLATIVE AFFAIRS,
U.S. DEPARTMENT OF JUSTICE

QUESTION: Mrs. Crawford, as the Assistant Attorney General for Legislative Affairs, you will speak for the Attorney General. Have you received any guidance from Attorney General Thornburgh with respect to your authority?

ANSWER: The Attorney General believes that the Department must speak with "one voice." He has made it clear that he intends that the Assistant Attorney General for the Office of Legislative Affairs speak for the Department on Capitol Hill.

QUESTION: Mrs. Crawford, part of your responsibilities will be keeping the Committee advised of the Department's position on various matters. Do you have any thoughts on how this information can best be conveyed to the Committee on a regular basis?

ANSWER: A good working relationship between the Department and the Congress requires a sound foundation of communication from the Department to the Congress and from the Congress to the Department. I see as one of my primary missions the facilitation of those two-way communications. I expect that we will share the Department's positions through a variety of formal and informal mechanisms, including Departmental testimony and reports on legislation pending before the Judiciary and other Committees, letters to individual Members, and telephone calls to and meetings with Members.

Senator METZENBAUM. Thank you. Appreciate you being with us. I just saw a young lady walk in the room. We are glad to have you with us. Is she a relative of one of the nominees that is up today?

Ms. PETERSON. Senator Metzenbaum, if you will permit me, I would like to introduce her. She is a very special friend of mine. Her name is Lauren Bates. Lauren, would you stand up?

Senator METZENBAUM. Hi, dear. How old are you?

Miss BATES. Seven-and-a-half.

Senator METZENBAUM. Seven-and-a-half? Now, this lady who just described you as being a special friend, we have the job in the Senate of confirming her. That means that we have to approve her after the President has chosen her. I would just like to ask you, do you think she is a good person for us to confirm?

Miss BATES. Yes.

Senator METZENBAUM. OK. Thank you very much. Thank you very much. [Laughter.]

Well, you are one up.

Ms. PETERSON. A real vote of confidence.

Senator METZENBAUM. Nobody stood up and said that you are not, so at this point, you are ahead.

Ms. Peterson, would you give us a brief statement if you care to? You need not if you do not care to.

TESTIMONY OF SHIRLEY D. PETERSON, TO BE ASSISTANT ATTORNEY GENERAL OF THE TAX DIVISION, DEPARTMENT OF JUSTICE

Ms. PETERSON. Thank you, Mr. Chairman. I would like to make a brief statement.

I just want to say that it is a great honor to be before this committee this morning as the President's nominee to be the Assistant Attorney General in charge of the Tax Division. As a tax lawyer, I have a very high regard for the Tax Division and for this particular position and I am mindful of the distinction with which many others have served in this position.

I want you to know that if you see fit to recommend my confirmation and if I am confirmed by the Senate, I will devote myself to this job with all the ability and energy and enthusiasm that I can muster. Thank you for your consideration. I will be happy to respond to your questions.

Senator METZENBAUM. Thank you.

If confirmed as Assistant Attorney General for the Tax Division, you will be responsible for tax-related issues at the Department of Justice. What do you consider to be the major problems or challenges that face you at the Tax Division?

Ms. PETERSON. Mr. Chairman, the Tax Division, like many other of the litigation divisions in the Department of Justice, but even more so, has a very significant problem in the recruitment and retention of personnel. The disparity that exists today between the salaries that are paid young lawyers that come to work for the Tax Division and those that are paid in private practice and in private industry—that disparity is now enormous.

We are finding it more and more difficult to attract and retain the high quality of personnel that is absolutely necessary to perform the functions of the Tax Division appropriately. I intend to devote a great deal of time and energy and I hope that this committee will support me in my request for additional budget in order to permit us to hire and keep the people that are necessary to do the very important job that the Tax Division performs.

Senator METZENBAUM. I assume it to be a fact that you yourself will experience a substantial decrease in income in taking on this responsibility.

Ms. PETERSON. Yes, Mr. Chairman.

Senator METZENBAUM. At the Tax Division, what will be your major goals and priorities, both with respect to civil and criminal enforcement?

Ms. PETERSON. Well, as you know, the Tax Division's principal responsibility is to ensure the fair and uniform enforcement of our tax laws. The Tax Division has an outstanding record in that regard and I intend to see to it that that is maintained.

I think that in addition to focusing on recruitment and retention of personnel, I will also be focusing on the litigation systems that we need in the Tax Division in order to handle the increased complexity in tax litigation. As you know, Senator, the tax laws are becoming more and more complex, notwithstanding the alleged simplification in 1986.

The cases that the Tax Division handles, many of them now involve enormous sums of money, thousands and thousands of documents. We need an automated litigation support system in order to help us to be able to handle those cases effectively. Our lawyers are up against the best tax lawyers every day in the courts of this Nation and I intend to do everything I can to provide the support to our litigating arm so that they can do their job effectively.

Senator METZENBAUM. Is there any general perception out there that the tax lawyers for the Government are less well-equipped, less well-prepared than the members of the private bar?

Ms. PETERSON. Senator Metzenbaum, the Tax Division lawyers are, I think, highly regarded by the private bar. Those of us who have litigated against them have only the highest regard and respect for these people. They are true professionals. I cannot say enough good about them. But the thing that I need to point out to you is that they handle a case load that is truly extraordinary.

I am told that the civil trial lawyers in the Tax Division, many of them have a docket approaching 90 cases. They may have 85 or 90 cases that they are responsible for. In the Appellate Division, I think the lawyers there may have a docket of 25 to 30 cases.

I can tell you, from 20 years of experience in private practice, that is not the way it is in private practice and therefore, the attorneys in the Tax Division just have a more difficult, onerous job in many ways and we simply have to do what we can to give them the support that they need.

Senator METZENBAUM. There have been suggestions stated that part of the problem of budget deficit could be met if there were more effective tax collection prosecutions. On the other side of that coin are the fears that exist that the Federal Government could be too invasive to the lives of ordinary citizens. Do you have any thoughts on that subject?

Ms. **Peterson**. Yes, Mr. Chairman, I do. With regard to uncollected taxes, there really are two categories of uncollected taxes that I think we can focus on. The first is taxes that are acknowledged to be due and owing, where a judgment has been obtained against the taxpayer, for example. In that area, the Tax Division has been extraordinarily effective in recent years.

The Tax Division has stepped up its debt collection activity and I am told that in the past couple of years, the actual debt collection by the Tax Division has exceeded, by a substantial amount, the Tax Division's budget. So, I think the Tax Division is already making a concerted effort there.

And it is my understanding, in our recent budget request, we have asked for additional funds to help us step it up even more because for the money we spend, we collect a great deal more in response. And those are taxes that everyone acknowledges are owing.

The second category of taxes that falls under the rubric that you have referred to are taxes that go unreported and I think, for example, of taxes on income that is not reported because it is gained from the sale of illegal drugs, for example. Now, as you know, the Internal Revenue Service, through its audit and administrative arms, is principally responsible for identifying and searching out those individuals and entities who are failing to report their taxes.

We defend the Commissioner's actions in that regard. We work closely with the Commissioner of Internal Revenue and the Chief Counsel of Internal Revenue, and I look forward to doing that and to providing all the assistance we can in the collection of unreported taxes.

Senator **Metzenbaum**. Ms. Peterson, since 1981, there have been literally thousands, many thousands, of pension terminations. They have lined the pockets of a stated number of employees in excess of $20 billion tax-free. That issue has been before the committees of the Congress for the past 5 years. I myself have been very active in this particular arena.

In 1987, the Reagan administration found that pension plan reversions jeopardized the promised retirement benefits of workers. The administration proposed legislation to limit that abuse, but it was not enacted. At an earlier point, the administration, and through the Tax Division, had determined that these reversions were illegal. They violated the law. It then went to the Cabinet Council. The Cabinet Council did a 180 degree reversal and concluded that they were legal.

What is happening is that there are excess funds that are there by reason of higher stock prices and higher interest yields than had been projected. The question is, to whom do those funds belong? The Tax Division of the Justice Department has not participated in the debate on this critical issue.

I wonder what actions you would propose to remedy the continuing threat to workers' pension benefits? This Senator makes it very clear that I have had it. Last session, I tied up a Bermuda treaty—I think it was Bermuda or Bahamas—a treaty from moving forward and being ratified until I got a commitment from the administration that they would not move any of these terminations until May

1 of this year. Unfortunately, prior to May 1, I could not get legislation enacted.

But I make no bones about it. I am determined I am going to resolve this issue. We are going to resolve this issue. There is strong congressional support. It is an inequity and my question is, I do not know to what extent you are familiar with this issue. But to what extent can we count upon your giving it your attention and hopefully coming up with an answer promptly?

Ms. PETERSON. Mr. Chairman, I believe that the question you raised concerns an issue of tax policy and I believe that you are approaching it from the proper direction—that is, the legislative process. As I have indicated before, it is my hope and intention, if confirmed in this position, to work very closely with the Assistant Secretary of the Treasury for Tax Policy, and with the Commissioner and Chief Counsel of Internal Revenue.

I would expect that that would be an issue that would be on one of our agendas.

Senator METZENBAUM. Could I inquire of you as to whether you would be willing to commit to get back to me and such other Members of Congress as have an interest—and there certainly are a number of others—within 60 days after you take office, regardless of whether you have a result or not, to indicate what efforts have been made up until that time and what conclusions, if any, have been reached?

Ms. PETERSON. I would be happy to consult with my counterparts in Treasury and in the Internal Revenue Service and to report back to you, sir.

Senator METZENBAUM. All right. Would you be good enough to accelerate that process, even prior to your confirmation so that you could get back to me prior to your confirmation? It is a matter of which I have concern. You are a nominee and I certainly feel there will be no difficulty in consulting with your counterparts, notwithstanding the fact that you do not hold the official position.

Ms. PETERSON. I would be glad to, sir.

Senator METZENBAUM. I look forward to hearing from you.

Last week—I discussed this with you in my office—the Washington Post reported on fundraising activities of tax-exempt charities, citing many examples where charities spent millions of dollars on fundraising campaigns and the charities got almost nothing. One charity spent $1.3 million to raise $1.4 million in donations. Of the $100,000 that went to the charity, less than one-third of that amount was spent on charitable activities.

That is not criminal, but it is about as close to it as you can get. It is not an isolated problem, but one that is all too typical. Some of these mail order houses truly rip off the American people and the American people have no defense.

Last year, the Supreme Court struck down a North Carolina law that attempted to regulate the fees paid by charities to professional fundraisers. The Court found that the State's requirement that the fundraiser disclose the percentage of donations that actually went to the charity violated the first amendment.

The Court did note, however, that charities could be required to disclose financial information, which would be available to potential donors. Potential donors could then use this information to determine how much the charities spent on fundraising versus how much money actually went toward a charitable purpose.

I understand the Tax Code requires tax exempt charities to disclose revenues and expenses on an annual basis by filing a IRS Form 990. I also understand these forms are available to the public through the IRS or from the charity.

Is it your impression that a potential donor could use these forms to determine how much of the money that a charity takes in actually goes toward the charitable purpose—that is, goes to those in need?

Ms. PETERSON. I believe so, and Mr. Chairman, it seems to me that the problem that you have identified can be approached in two different ways. One—and I am happy to report to you that the Internal Revenue Service has, in the past, on occasion, either revoked the tax exemption or denied a tax exemption to organizations which have engaged in activities such as those that you have delineated.

And I am also happy to tell you that the Tax Division has successfully defended the Commissioner's determination in those cases. So, when we have litigated those cases in court, we have won. In addition, I should say that the other possibility, and one that we discussed earlier, is the legislative possibility and again, that is more properly addressed, I believe, by the Assistant Secretary of Treasury for Tax Policy, as we are the litigating arm rather than the policy arm.

Senator METZENBAUM. And that is an area with respect to legislative policy that you and I agreed, I think in my office, that you would get-back to me within 60 days with some possible suggestions.

Ms. PETERSON. That is correct, sir.

Senator METZENBAUM. I understand some charities may underreport fundraising costs and overstate funds that go toward the charitable purpose. This is done by reporting the cost of soliciting funds as educational expenses merely because a direct mail solicitation includes a few facts regarding cancer or AIDS or whatever the case may be.

Should the Government not prevent charities from misleading potential donors regarding the amount of money that actually goes toward a charitable purpose and require the charity to be more explicit and be more forthcoming with respect to the facts to potential donors?

Ms. PETERSON. Well, I certainly think that it is both unwise and unfair if the charity, in fact, misleads the donor. I agree with you that they should not do that.

Senator METZENBAUM. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Would you tell us a little bit about your background, Ms. Peterson, where you have worked and what positions you have held?

Ms. PETERSON. Yes, Senator. I have been a tax lawyer in the Washington law firm of Steptoe and Johnson for almost 20 years. I came there in the fall of 1969, I am happy to say, the first woman to come and to stay at Steptoe and Johnson, and there have been many women who have followed behind me. I am very proud of that.

I have been very active in the tax section of the American Bar Association and have chaired one of its major committees. I have also been very active in the American College of Probate Counsel and served on many of its committees. I have also participated in the management of Steptoe and Johnson itself. I have served on all of its major committees, including the executive committee, the compensation committee, the partnership selection committee. I have had a relatively large amount of management experience for a practicing attorney

Senator KOHL. Well, that is very impressive. Thank you.

The collection of unpaid taxes must be an intriguing question that you have thought about. Particularly in this last election, we heard at least one of the candidates talk about enormous amounts of money that he thought were out there that we were not collecting. Senator Metzenbaum alluded to it.

I would be interested in the thoughts that you have had in the recent past about what kind of ambitions you might have with respect to maximizing the collection of legitimately owed, unpaid taxes in this country.

Ms. PETERSON. Well, let me respond in two ways. First, the Tax Division is already cooperating with the Task Force on Organized Crime Drug Enforcement. I think that there is no question that there is an enormous amount of unreported income in connection with the illegal drug sales that are going on in this country. And as you know, there is a task force that is addressing that issue.

The Tax Division is working closely and cooperating in every way we can with that task force and we will continue to do so. Moreover, I think that it is extremely important that all of the tax arms of the Federal Government work together and to that end, I hope to have a very close working relationship with the Commissioner and Chief Counsel because as you know, it is the Internal Revenue Service that has the principal responsibility for identifying taxpayers who are failing to perform on their legitimate commitment.

Our job then is to defend the Commissioner's position and to prosecute, as appropriate, those who commit tax crimes.

Senator KOHL. OK. Ms. Peterson, how do you feel about assets that are passed on from one family member, one generation to another, with respect to taxation of them?

Ms. PETERSON. Well, as you know, the Federal Government has a transfer tax system. It has a unified estate and gift tax system and that tax is designed to tax transfers in excess of a certain amount. There are exemptions and exclusions, but all transfers above that amount are taxed at a graduated rate and I would expect to enforce that tax law just as any other.

Senator KOHL. I understand.

Ms. PETERSON. That is responsive to your question, I hope.

Senator KOHL. I was interested in your opinion on that tax and whether or not that tax should be, in your judgment changed. This does not have anything to do specifically with the job that we are talking about, but you are a person who has had a background in this business all of your life. You must have some opinions. I am sure you do. I would be interested in your opinion.

Ms. PETERSON. On the estate and gift tax as such? I think that our estate and gift tax system basically serves a useful purpose and I support it. There have been some recent changes in the estate tax law that I personally felt were not advantageous, specifically section 2036(c), and I have written and lectured widely on that and that may be what you are referring to because I do believe that that particular section of the Code creates enormous problems.

I personally hope that the Congress will see fit to reconsider its position on that particular thing.

Senator KOHL. Do you believe that the IRS should inform taxpayers of errors in their favor?

Ms. PETERSON. Yes. Do they not? I am sorry.

Senator KOHL. Well, there is a bill by Senator Gore by which it would extend the statute of limitations for payment of IRS refunds. Senator Gore discovered that the IRS training manuals had been instructing IRS officials, since 1985, not to inform taxpayers when they had made a mistake and overpaid their taxes.

Ms. PETERSON. I was not aware of that.

Senator KOHL. So, you would be—knowing that, you——

Ms. PETERSON. I am surprised to hear it, Senator, yes.

Senator KOHL. How do you feel about capital gains? Do you think that capital gains should receive preferential tax treatment, Ms. Peterson?

Ms. PETERSON. Well again, that is a subject that I believe is more of a policy question than it is a litigation question and I would defer to my counterparts in Treasury who have had the opportunity to study that and determine what the true economic impact of that is.

Senator KOHL. And I appreciate what you are saying and you really do not have to answer any question you do not want to. But you must have had some thoughts on it over the years. I am just curious to know what your thoughts are with respect to capital gains and whether or not, in your judgment, they might receive special, preferential treatment?

Ms. PETERSON. Well, I think that it is a very complex question, and I am happy to share with you some of my thoughts on it, but I do think that it is a complex question because it is true that in 1986, when the Tax Reform Act of 1986 changed the treatment of capital gains, and eliminated many preferences for other tax items, as you know, the goal, at that time, was to simplify the tax system.

I do think that that was, in some part, accomplished. I think, to differentiate between capital gains and other types of income, might be a step away from that. On the other hand, I am also cognizant of the President's views on this subject and the thought that the reduction of capital gains will increase activity in the investment world and in the markets, and I am very sympathetic to that point of view.

I would, again, I think, defer to my counterparts at Treasury for their decision on that.

Senator KOHL. OK. Section 89—do you have any comments to make on section 89—whether or not you feel we need to reform it or repeal it?

Ms. **Peterson**. My impression is that that again is an area where complexity may have overwhelmed us and that additional consideration needs to be given to it.

Senator **Kohl**. Thank you, Ms. Peterson. I thank you very much for being here. We may or may not get back to you in writing with some other questions.

Ms. **Peterson**. Thank you for taking the time, Senator.

Senator **Kohl**. Good job, nice job, good to have you.

[Pertinent information follows:]

U.S. Department of Justice

Washington, D.C. 20530

MAY 10 1989

Honorable Howard Metzenbaum
United States Senate
Washington, D.C. 20510

Dear Senator Metzenbaum:

Pursuant to your request this morning of Shirley Peterson, the nominee for Assistant Attorney General, Tax Division, enclosed is a copy of the draft recusal letter that will be provided by the nominee to the appropriate personnel within the Department of Justice, if she is confirmed.

We hope this will be responsive to you request.

Sincerely,

Janis A. Sposato

Janis A. Sposato
General Counsel
Justice Management Division

U.S. Department of Justice

Tax Division

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

MEMORANDUM

To: All Section/Office Chiefs
Tax Division

From: Shirley D. Peterson
Assistant Attorney General
Tax Division

Subject: Recusals

At the present time, I am recused from any matter involving, as an actual or potential target or other interested party, any of the entities listed below. I intend to avoid all personal participation in matters involving these entities, unless I obtain a waiver of disqualification pursuant to 18 U.S.C. § 208:

ALLTEL
American Home Products
AMOCO
Atlantic Richfield
Baltek Corp.
Baltimore Gas & Electric
Bell Atlantic
Bellsouth Corp.
Bemis
Bristol Myers
Carter Wallace
Donnelley RR
Duke Power
Emerson Electric
Fabricand
Florida Progress
Ford Motor Co.
FPL Group
General Electric
IBM
Johnson & Johnson
Juno Lighting

DRAFT

Knight Ridder
Liz Claiborne
Lindal Cedar Homes
Martin Lawrence Editions
Merck & Co.
Minnesota Mining & Mfg.
Monsanto Co.
NAPCO Security Systems
New York Times
Philip Morris
Pitney Bowes
Southern California Water
State O Maine
Southwestern Bell
State Street Boston
Superior Industries
TECO Energy
Thermo Electron
Tucson Electric Power Co.
Upper Peninsula Power
Wolohan Lumber

Federated Master Trust
Marine Midland Bank - Diversified Investment Fund

Alabama State Public School & College Authority
Clay County, Florida, Housing Finance Authority
Coralville, Iowa, Multi-Family Housing
Dade City, Florida, Educational Facilities Authority
Orange County, Florida, Housing Finance Authority
Oyster Bay N.Y. MBIA
Pinellas County, Florida, Housing Finance Authority

If any matter should arise involving the above entities, presenting issues arising under Section 482 of the Code, concerning the deductibility of premiums to a "captive insurance company," or in which the law firm of Steptoe & Johnson is representing a party, please deal directly with the available senior Deputy Assistant Attorney General.

With respect to my participation in matters involving my former clients, I intend to follow the guidelines for disqualification promulgated by the Administrative Conference of the United States (Recommendation 80-4).

Senator METZENBAUM. Ms. Crawford, you have just about 20 minutes to sell your case because in 20 minutes, we are due on the floor for taking an oath in connection with an impeachment trial that will be coming before us. Do you have an opening statement?

TESTIMONY OF CAROL T. CRAWFORD, TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE

Ms. CRAWFORD. Well, that perhaps invites a long opening statement. But no, I have no opening statement other than to thank you and your colleagues, and for the staff, who have been very cooperative and very helpful in scheduling, not only this hearing for my own nomination, but for my colleagues here and we appreciate your help in that regard.

Senator METZENBAUM. Thank you very much.

In the past few years, we encountered some problems in obtaining responses to document requests, which we propounded to the Justice Department. Last year, for example, Acting Assistant Attorney General Thomas Boyd responded to a document request which I made by questioning the Judiciary Committee's authority to obtain materials which do not relate to pending legislation. Mr. Boyd subsequently disavowed this view.

I take it, at least hopefully, that you would not subscribe to such a narrow view of the Judiciary Committee's power to obtain documents from the Department.

Ms. CRAWFORD. No, again, I think, in part, because I spent a number of years working on Senator Packwood's staff, as he indicated. I do have the perspective of being at this end of the street. But I think also, from a constitutional perspective, the Congress has very broad interests in knowing what the executive branch is doing and how it is doing it and I think that responsibility and that need, that constitutional need extends both to the legislative process and also to oversight, and I think it is that part of that oversight responsibility.

It is very clear that there is a far-ranging, legitimate interest in obtaining both documents and other information that might be sought.

Senator METZENBAUM. Do I understand you to say—do I understand your response to indicate that generally speaking, you would tip the scale in favor of making the documents available to the Judiciary Committee, rather than with finding a legal basis on which to withhold them?

Ms. CRAWFORD. I think yes. I think generally that is true. As the Attorney General indicated, and I certainly concur in this, we have no interest in obstructing the legitimate flow of information to the Congress. I mean, it is part of my function to provide information to facilitate the provision of information and documents.

Senator METZENBAUM. Do you think it is appropriate for the Justice Department to make a determination as to what is or is not within the scope of the Judiciary Committee's jurisdiction?

Ms. CRAWFORD. I do not quite know how to answer that. I think there will be occasions when, within the—there will be occasions when the Justice Department will be required to make a determination as to the application of executive privilege.

By necessity, there are ground rules that must be followed with respect to the executive branch, the necessity of the executive branch following its constitutional responsibility to see that the laws are enforced, and that does have certain implications for certain areas, for example, open investigations. I think that is clearly established that in cases of open investigations, there are sound bases for denying access to information or documents.

Senator METZENBAUM. What do you understand to be the scope and breadth of executive privilege—and that may be too tough a question to ask you at this point.

Ms. CRAWFORD. Well, I would ask that you not hold me to that definition. I have not been at the Justice Department. I am there only on an acting basis and I do not see myself as an expert on the doctrine, even slightly. I cannot even begin to claim any expertise.

I think if confirmed, I certainly would develop a more precise understanding of the breadth of the doctrine of executive privilege. I think the areas where it clearly seems to apply and again, I would not presume to hold myself out as an expert on executive privilege, would be the areas, for example, of national security. I think there seems to be a better established doctrine on executive privilege with respect to national security issues.

But I think, again, there will always be that penumbra or that simulacra, if you will, that will raise questions, in which case, we will have to engage in a dialog and some negotiations as to the application of the doctrine.

Senator METZENBAUM. The Supreme Court has described Congress' investigative power in the following manner:

> The power of Congress to conduct investigations is broad. It encompasses inquiries concerning the administration of existing laws, as well as proposed and possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes of departments of the Federal Government to expose corruption, inefficiency or waste.

Would you agree or have any difficulty with that assessment of Congress' oversight authority?

Ms. CRAWFORD. No.

Senator METZENBAUM. Ms. Crawford, we have also had problems in getting the Department to respond to information requests in a timely manner. For example, last year's comprehensive antidrug legislation included a provision requiring the Attorney General to develop a system for the immediate and accurate identification of felons who unlawfully attempt to purchase firearms.

Over 2½ months ago, I wrote Justice requesting information pertinent to the statutory duty to develop this system. The Department acknowledged receipt of my letter, but I have not received a detailed response to my request.

What do you consider to be an appropriate response time to congressional requests for information, that being 2½ months now that have expired?

Ms. CRAWFORD. Senator, if I can divide your question, I am recused on matters relating to guns, so if I may, I would like to distinguish your question, the timing issue from the substantive question.

Senator METZENBAUM. Why are you recused?

Ms. CRAWFORD. I am recused because I have a potential conflict, so I will not be involved in gun issues.

Senator METZENBAUM. Would you be good enough to share that kind of potential conflict? Is that yours or your husband's?

Ms. CRAWFORD. Both. I have stock holdings and my husband has interests.

Senator METZENBAUM. I see, OK.

Ms. CRAWFORD. So, I have pulled down a curtain when it comes to guns.

Senator METZENBAUM. OK, beyond that.

Ms. CRAWFORD. So, that is why I say if we can relate the question to another issue, I have no knowledge of your inquiry as to guns because my staff knows not to raise anything relating to guns.

However, I will ask my staff—there is a member of my staff here—and I will ask that your request be given expedited consideration.

As to timing, it is certainly one of my objectives to make sure that we respond to congressional inquiries of all sorts as expeditiously as possible. One of my first jobs, I will say, if confirmed going to Legislative Affairs, is to address the very large volume of requests from Congress and within the administration for comments on legislative proposals—over 2,000 requests within the administration, for example, for comments on legislative proposals; several hundred, over a thousand last year, from the Congress, as well as hundreds and hundreds and thousands of inquiries such as yours.

I think what we need to do is develop a system that allows us to respond as quickly and completely as we possibly can. It is a difficult task, but I think it is an important one.

Senator METZENBAUM. Are you recused in connection with any other areas?

Ms. CRAWFORD. I have discussed with General Counsel other possible areas of recusal and have asked our General Counsel at the Justice Department to draft a memorandum that I will furnish to my staff and others within the Department as to areas that would be appropriate for my recusal, yes.

Senator METZENBAUM. Would be appropriate for——

Ms. CRAWFORD. Yes, other areas for recusal.

Senator METZENBAUM. Can we get a copy of that?

Ms. CRAWFORD. I would be happy to, Senator.

Senator METZENBAUM. Thank you. Senator Kohl.

Senator KOHL. Do those recusal areas include some of your real estate holdings?

Ms. CRAWFORD. No.

Senator KOHL. I had a question about that. You indicated, in responses to our committee's questionnaire, that you have been an officer of the Columbus Shopping Center, which is a family-owned business in New Jersey?

Ms. CRAWFORD. That is correct.

Senator KOHL. Is there a specific role that you have in this business?

Ms. CRAWFORD. I was an officer and a director. The corporation was sold last year so I no longer have any role.

Senator KOHL. So there is no current financial interest in those corporations?

Ms. CRAWFORD. No.

Senator KOHL. OK. Well, thank you very much.

Senator METZENBAUM. Thank you. I am informed that Senator Kennedy will have some questions for you, but the record will remain open with respect to all witnesses if any members of the committee have questions. We will include not only their questions, but the answers in the record.

We appreciate you appearing before us, Ms. Crawford. We may have additional questions. If we do, we will send them to you through the mail.

Ms. CRAWFORD. I hope not by the mail. I hope by delivery to expedite the process.

Senator METZENBAUM. We will either fax it to you, or hand-deliver it to you.

Ms. CRAWFORD. Thank you very much, Senators.

Senator METZENBAUM. Thank you. With that, the committee stands adjourned.

[Whereupon, at 10:45 a.m., the committee was adjourned, subject to the call of the chair.]

[Pertinent information follows:]

QUESTIONS FROM SENATOR EDWARD KENNEDY

FOR

CAROL T. CRAWFORD, OF VIRGINIA,
TO BE ASSISTANT ATTORNEY GENERAL,
OFFICE OF LEGISLATIVE AFFAIRS,
U.S. DEPARTMENT OF JUSTICE

QUESTION: On April 6, 1989, a bipartisan group of senators on this committee, joined by the Chairman of the Permanent Subcommittee on Investigations, contacted Attorney General Thornburgh to express reservations concerning a proposal to abolish organized crime strike forces. The correspondence also requested data the Department may have concerning the performance of the strike forces in recent years. I understand an effort is being made to respond to this request for information.

Will you agree to provide the senators who contacted the Department on this issue with the relevant data prior to a decision being made concerning organized crime strike forces?

ANSWER: Your letter of April 6 requested any data the Department may have concerning the performance of the strike forces in recent years. I will be happy to share that data with you and other members of the Judiciary Committee before the Attorney General makes a final decision on the organization of the strike forces.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 12, 1989

Honorable Howard M. Metzenbaum
United States Senate
Washington, D.C. 20510-3502

Dear Senator Metzenbaum:

This will confirm that, as discussed at her confirmation hearing before the Judiciary Committee, Shirley Peterson has contacted the Office of the Assistant Secretary of Treasury for Tax Policy and the Offices of the Commissioner and Chief Counsel of the Internal Revenue Service regarding your concern about reversions from over-funded pension plans. Mrs. Peterson will meet with representatives of those offices as soon as possible following Mrs. Peterson's assumption of her duties, if she is confirmed.

Although Mrs. Peterson will, if confirmed, be serving in the Justice Department and, thus, will have no direct authority over the Administration's legislative program, she understands your concerns and will convey them to the appropriate officials.

Sincerely,

Carol T. Crawford

CAROL T. CRAWFORD
Acting Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL
DEPUTY ATTORNEY GENERAL
COMPONENT HEADS
OLA STAFF

FROM: CAROL T. CRAWFORD
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

SUBJECT: Recusals

This memorandum is to advise you of certain recusals I have determined, in consultation with the Department's General Counsel, to be appropriate to avoid a conflict of interest or appearance of a conflict in the course of carrying out my responsibilities in the Department.

At the present time I am recused from any matters involving the entities listed below. I intend to avoid any personal participation in matters involving these entities unless I have obtained a waiver of disqualification pursuant to 18 USC 208.

Allied Signal Corporation
Amoco
BMJ Financial Corporation
Capital Preservation Growth, Ltd.
Exxon
Ironwood Partners
Northrop Corporation
Oceanview-Virginia Beach Hotel
P.G. Limited Partnership
Pure Cycle Corp.
QB Enterprise
Royal Dutch Petroleum
Smithfield Foods
Sturm-Ruger Corporation
Tucson Electronic

In addition, I am recused from matters involving firearms and cable TV. With respect to other entities for whom my spouse provides consulting services, I will make a determination as to my participation in a particular matter on a case by case basis using guidelines and criteria recommended by the Administrative Conference of the U.S. (Recommendation 80-4).

In matters involving these entities, please deal directly with the available senior Deputy Assistant Attorney General.

FERDINAND F. FERNANDEZ

Birth:	May 29, 1937	Pasadena, California
Legal Residence:	California	
Marital Status:	Married	Priscilla McMillen Fernandez 2 children
Education:	1954 - 1958	University of Southern California B.S. degree
	1958 - 1962	University of Southern California School of Law LL.B. degree
	1962 - 1963	Harvard Law School LL.M. degree
Bar:	1963	California
Experience:	1963 - 1964	Law Clerk to Hon. William M. Byrne United States District Court Central District of California
	1964 - 1980	Allard, Shelton & O'Connor Associate 1964-1968 Partner 1968-1980
	1980 - 1985	Judge, Superior Court of the State of California for the County of San Bernardino
	1985 - present	United States District Judge Central District of California
Office:	312 No. Spring Street, Rm 231 Los Angeles, California 90012 213 894-2041	
Home:	117 West Arrow Highway Upland, California 91786	

To be United States Circuit Judge for the Ninth Circuit

INFORMATION
FOR
SENATE COMMITTEE
ON THE
JUDICIARY

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   Ferdinand Francis Fernandez

2. Address: List current place of residence and office address(es).

   (a) Home address:
   117 West Arrow Highway
   Upland, CA 91786

   (b) Office address:
   312 North Spring Street
   Los Angeles, CA 90012

3. Date and place of birth.

   May 29, 1937 at Pasadena, California.

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   (a) Priscilla McMillen Fernandez
   (b) Librarian
   (c) Chaffey College
   5885 Haven Avenue
   Alta Loma, CA

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   (a) University of Southern California, 1954-1958; Degrees awarded: Bachelor of Science Electrical Engineering
   (b) University of Southern California, 1958-1962, Degree awarded: Bachelor of Laws.
   (c) Harvard Unversity, 1962-1963; Degree awarded: Master of Laws.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations,

nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

(a) United States District Court, Central District of California, November 1985 to present.
(b) Superior Court of the State of California in and for the County of San Bernardino. June 1980 to November 1985.
(c) I was with the firm of Allard, Shelton & O'Connor, 100 Pomona Mall West, 6th Floor, Pomona, California 91766 from September 1964 to June 1980. I was an associate until January 1968 and a partner thereafter.
(d) From September 1963 to September 1964, I was the Law Clerk for Judge William M. Byrne, Judge of the United States District Court for the Central District of California.
(e) From June 1958 to June 1962, I worked as an electrical engineer at Hughes Aircraft Company in Culver City, California.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

I have not had any military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

(a) Undergraduate: Phi Kappa Phi, honorary; Tau Beta Pi, Engineering honorary; Eta Kappa Nu, Electrical Engineering honorary; and Phi Eta Sigma, honorary.
(b) Law School: Member of Law Review; Order of Coif.
(c) I received a fellowship to attend Harvard Law School 1962-63.
(d) Practice: I was elected as a Fellow of the American College of Probate Counsel in March 1979.
(e) On bench: I received a grant from the National Endowment for the Humanities in the summer of 1981 to attend a four week seminar at the Yale Law School on "Theories of Adjudication."

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

(a) Federal Judges Association; Ninth Circuit District Judges Association.
(b) California Judges Association, 1980-1986: Member, Juvenile Courts Committee, October 1981-September 1984

(Chairman, September 1983-September 1984); Faculty Member, California Judicial College, 1982 and 1983.

(c) California Center for Judicial Education and Research: Faculty Member, Juvenile Law and Procedure Institute, 1983; Faculty Member, Continuing Judicial Studies Program, Jurisprudence and Humanities Course, January 1983, January 1984, August 1984 and February 1985. (Team leader for the course, August 1984, February 1985, and August 1985).

(d) State Bar of California: Member, Committee on Administration of Justice, 1969 to June 1980. (Chairman, October 1976 to October 1977); member, Ad Hoc Committee on Attachments, 1970 to 1975. (Chairman, 1971 to 1985; Member, Taxation Section, 1975-1981. (Member of Executive Committee of Section, 1977 to June 1980); Member, Special Committee on Mandatory Fee Arbitration, October 1978 to January 1979; Member, Federal Courts Committee, 1966 to 1969.

(e) Los Angeles County Bar Association: Bulletin Committee, April 1974 to May 1975.

(f) Pomona Valley Bar Association (Now Eastern Bar Association): Trustee, 1971 to 1978; Co-Editor of Newsletter, 1970 to October 1972; Secretary-Treasurer, June 1973 to July 1974; Second Vice-President, July 1974 to July 1975; First Vice-President, July 1975 to July 1976; and President, July 1976 to July 1977.

(g) Estate Planning Council of Pomona Valley: Secretary, 1966 to 1976.

(h) In addition: I am presently a member of The Eastern Bar Association of Los Angeles, The American Bar Association, The Federal Bar Association, and The Hispanic National Bar Association. In the past I was also a member of The California Trial Lawyers Association.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Corporation member - Pilgrim Place in Claremont; Chaffey Community Art Association; National Parks and Conservation Association; Legion Lex (U.S.C.); National Trust for Historic Preservation.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

(a) California Supreme Court, and all other California courts; January 1963.

(b) United States District Court, Central District of California; June 1964.

(c) United States Supreme Court; May 1967.

(d) None lapsed.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

The Free Exercise of Religion, 36 Southern California Law Review 546 (1963); The Constitutionality of The Fourteenth Amendment, 39 Southern California Law Review 378 (1966); Except a California Indian: A Study in Legal Discrimination, 50 Southern California Quarterly 161 (1968); The Obligation to Obey Law; 43 Los Angeles Bar Bulletin 116 (1968); The Census, 42 Southern California Law Review 245 (1969); 19 Law Review Digest 1 (1969); 10 Publishing Entertainment Advertising Law Quarterly 196 (1970); Due Process and Pollution: The Right to Remedy, 16 Villanova Law Review 789 (1971); Pollution and The Law of Public and Private Nuisance, 11 California Trial Lawyers Journal 47 (1972); On Liberating the Chancellor, 49 Los Angeles Bar Bulletin 301 (1974); Some Implications of the Differences Between "Concrete" Facts and "Legal" Facts, 50 Los Angeles Bar Bulletin, 114 (1975); Due Process: The Constitutional Right to a Remedy, 15 California Trial Lawyers Association 187 (1976); The Pending Proposal for Mandatory Fee Arbitration, 52 California State Bar Journal 520 (1977); The Amicus Curiae Brief, Its Increasing Use, 9 California Trial Lawyers Association Forum 9 (1979); Custom and the Common Law: Judicial Restraint and Lawmaking by Courts, 11 Southwestern U.L. Rev. 1237 (1979).

13. Health: What is the present state of your health? List the date of your last physical examination.

(a) Excellent.
(b) October 1987.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

(a) United States District Court, Central District of California, November 1985 to present.
(b) Superior Court of the State of California in and for the County of San Bernardino, June 1980 to November 1985. I was appointed to this office in June 1980. I was then elected to it in June 1982. The Superior Court is a trial court of general jurisdiction. It does not, in general, hear cases where the demand or value is under $15,000.

15. *Citations*: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(a) Regarding opinions I have written, please see the enclosures.

(b) Regarding reversals:

(i) *United States v. General Dynamics Corp.*, 828 F.2d 1356 (9th Cir. 1987). - The Circuit Court did not agree that the "primary jurisdiction" doctrine required that this case be referred to the Armed Services Board of Contract Appeals.

(ii) *Usher v. City of Los Angeles*, 823 F.2d 556 (9th Cir. 1987). - The major issue in this case was whether *Wilson v. Garcia*, 471 U.S. 261 (1985) was retroactive. I held that it was partially so. The Court of Appeals disagreed and held that it was not.

(iii) *Benewick v. The Limited Stores*, No. 86-5523 (enclosed). - Because of presence of "Does," case reversed.

(iv) *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). - I found that there was not a remedy for copying a singer's voice style. The Court, basically, agreed that there had not been one, but it then created one.

(v) *Desrossiers v. Secretary of Health and Human Services*, 846 F.2d 573 (9th Cir. 1988). - The ALJ held that plaintiff was not entitled to benefits. The U.S. Magistrate recommended that the ALJ be upheld, and I did so. The Court of Appeals disagreed and reversed for further hearings.

(vi) *Hansen v. Western Greyhound*, 859 F.2d 779 (9th Cir. 1988). - Plaintiff took disability retirement benefit, and then applied for early retirement benefit also. Pension Plan Trustees ruled he had no right to both. There were a number of issues and I upheld Trustees' decision at summary judgment. The Court of Appeals found there was an issue of fact on the question of waiver, and reversed to have that issue decided.

(vii) United States v. Egan, 860 F.2d 904 (9th Cir. 1988). - This was a prosecution of a city councilman for Hobbs Act and mail fraud violations. All rulings I made followed the law at the time. However, in light of the later case of McNally v. United States, 107 S.Ct. 2875 (1987) the mail fraud conviction was reversed.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

(a) Vice-Chairman of the City of La Verne Commission on

Environmental Quality from 1971 to July 1973. I was appointed to that position.

(b) Chairman of the City of Claremont Environmental Quality Board from 1972 to July 1973. I was appointed to that position.

(c) I have never been an unsuccessful candidate for elective public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

   See Item 6 (d).

2. whether you practiced alone, and if so, the addresses and dates;

   I did not.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

   (i) See Item 6 (b)
   (ii) See Item 6 (c)

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character as changed over the years?

   (i) As a judge I have done general civil, criminal, and juvenile trial work, as well as law and motion and writ work.
   (ii) In practice.

      (a) The majority of my direct work with clients was in the areas of estate planning and probate. In addition, I gave advice to charitable institutions, particularly in the area of charitable giving.
      (b) I was also involved in the planning of litigation matters, determining the legal issues involved in litigation, and the proper manner of presenting cases for resolution. In this capacity, I was expected to have a rather broad knowledge of

constitutional law, tort law, procedure, and most other legal disciplines.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

   (i) In general, my clients were individuals from all walks of life, who, for example, needed services ranging from the simplest Will to extremely complex estate plans. However, I also represented a number of colleges and other charities, particularly in the charitable giving area.

   (ii) Specialties: I believe I was quite knowledgeable in the area of constitutional law, tort law, charitable giving, estate planning, probate, and estate and gift taxation. I was a Certified Specialist in Taxation Law.

c. 1. Did you appear in court regularly, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I did not appear in trial courts, except at basically uncontested hearings, such as probate matters. I had occasional appearances in appellate courts.

2. What percentage of these appearances was in

(i) Federal courts: Zero
(ii) State courts of record: 100%
(iii) Other courts: Zero

3. What percentage of your litigation was

(i) Civil: Almost all
(ii) Criminal: A little criminal appeal work

4. State the number of cases in courts of record you tried to verdict of judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

None.

5. What percentage of these trials was

(i) Jury
(ii) Non-jury

Not applicable.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    (a) the date of representation;
    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
    (c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

        (i) Martinez-Ferrer v. Richardson - Merrell Inc., Second Appellate District Division 5; Civil No. 55884; Justice Kaus, Ashby, and Stephens; reported at 105 Cal. App. 3d 316 (1980); opposing counsel, Edward J. Horowitz. Issue was proper statute of limitations, where a drug caused a slight injury one year, but a severe injury developed later. I was co-author of brief. Co-counsel was Paul M. Mahoney, also of Allard, Shelton & O'Connor at that time. Now with Jones, Mahoney & Brayton, 100 Pomona Mall West, Suite 506, Pomona, California, 714-623-2411.
        (ii) Claremont University Center v. Garrett, et al.; Superior Court of the State of California for the County of Los Angeles, Case No. EAC-19655 (1975); Judge, Paul Egly; Opposing counsel, Walter L. Gordon III, 4104 South Central Avenue, Los Angeles, California, and Jimmy L. Gutierrez, 12616 Central Avenue, Chino, California, 714-627-3535. Injunction action for purpose of terminating the occupation of a building on the college campus. Injunction granted.
        (iii) People v. Frederick Norman Miller, Court of Appeal of State of California, Second Appellate District, Division 4; Criminal No. 21569 (1973); Justices Kingsley, Jefferson, and Dunn; Opposing counsel, William K. McCallister, Jr., Deputy Attorney General. Claim that conviction should be reversed because of double jeopardy, improper sentencing, and improper instructions. Reversed in part, and affirmed in part.
        (iv) People v. John Petrisin; Court of Appeal of State of California, Second Appellate District, Division 1; Criminal No. 17132 (1971); Justices Wood, Lillie and Thompson; Opposing counsel,

Russell Iungerich, Deputy Attorney General. Claim that, among other things, jury was improperly instructed. Reversed.

(v) People v. Howard L. Lundy; Court of Appeal of State of California, Second Appellate District, Division 4; Criminal No. 15795; reported, 2 Cal. App. 3d 939 (1969); Justices Kingsley, Files and Dunn; Opposing counsel, Thomas E. Warriner. Claims of insufficient evidence, illegal search and seizure, improper lineup, and improper jury instructions. Affirmed.

(vi) People v. Ellis B. Myers, Court of Appeal of State of California, Second Appellate District, Division 4; Criminal No. 13614; reported, 262 Cal. App. 3d 307 (1968); Justices Kingsley, Files and Jefferson; Opposing counsel, Richard L. Hamilton, Deputy Attorney General. Claims of improper admission of confession and prejudicial separation of jury. Affirmed.

(vii) Russell Sloan, et. al. v. Columbia Savings and Loan Association, et al.; Superior Court of the State of California for the County of Los Angeles; Case No. EAC-4761 (1968); Judge, Glenn M. Pfau; Opposing counsel, Thomas Jensen (of Title Insurance and Trust Company). This was a claim by our client that a subordination was done in an improper manner, and, as a result, was not enforceable. Summary judgment for Plaintiff. Matter ultimately settled before appeal. Co-counsel, Charles S. Vogel, now at Sidley & Austin, 213-553-8100.

(viii) Consolidated Foods Corporation v. J. F. Kerns Industries, Inc.; Superior Court of the State of California for the County of Los Angeles; Case No. EAC-8651 (1968); Judge Glenn M. Pfau; Oppposing cousel, Richard L. Goff, Heller, Ehrman, White, and McAuliffe, 44 Montgomery Street, San Francisco, California. Claim by Consolidated Foods against our client for unfair competition and breach of fiduciary duties. Preliminary injunction substantially denied, but granted in part. Case ultimately dismissed for failure by Plaintiff to prosecute. Co-counsel, Charles S. Vogel, now at Sidley & Austin, 213-553-8100.

(ix) People v. Robert Botts; Court of Appeal of the State of California, Second Appellate District, Division 4; Criminal No. 11310; reported, 250 Cal. App. 2d 478 (1967), Justices Kingsley, Files, and Jefferson; Opposing counsel, Howard J. Bechefsky, Deputy Attorney General. Claims of unreasonable search and seizure, improper admission of admissions, and insufficient evidence. Reversed.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Because of the nature of my practice (see 17), it can only be said that the most significant matters were complex estate plans or charitable gifts -- annuity trusts, unitrusts, and the like. To detail them further would tend to disclose client financial information, which should not be done (in any event, since I have not practiced law for eight years it would be impossible to be accurate).

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I foresee none at this time. However, if any question should arise I would take steps to avoid even the appearance of a conflict.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report required by the Ethics in Government Act of 1978 may be substituted here.)

   Disclosure Report for January 1, 1988 - February 28, 1989 is enclosed.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

   Enclosed - Exhibit A.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   Only my own campaign to be reelected to the Superior Court in 1952.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have concerned myself with many pressing issues of the day, including: environmental concerns (I was President of the local Audubon Society from 1968-1970 and served on public advisory boards, see Item I-16, above); problems of the aging (I was on the Board of Directors of Pilgrim Place in Claremont, a community of retired church workers from 1972-1980); and problems of those with disabling injuries or diseases (I was on the Board of Directors of Casa Colina Hospital for Rehabilitative Medicine from 1974-1980).

In my professional life, I devoted long hours to making the law more just and to suggesting ways in which that could be accomplished. See, for example, my years of work on State Bar Committees (Item I-9, above), and my writings on legal topics (see I-12, above).

During my career as a lawyer I handled many legal matters in my area of expertise for little or no fees in order to help people through legal problems after the death of loved ones, and also to help them plan for their futures. For example, I helped a family provide for the preservation of the historic home in which they lived so that their daughter could have some benefit, and so the home could be preserved for the public for the future. This work was not for compensation.

I had five appointments from appellate courts in criminal cases which I handled for minimal fees. Moreover, I gave much free legal advice to a number of charitable organizations.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I do not belong to any such organizations, and have not since I became a judge in 1980. I agree that it is inappropriate for a judge to hold membership in clubs that are exclusionary.

I was a member of the University Club of Claremont from about 1970 until 1980. That was a club that met for lunch at a local restaurant once a week. It did not admit women to membership. While I was a member I, and others, attempted to get the club to change its policy in that regard. We brought the matter to a vote four or five times without success. When I became a judge in 1980, I resigned because of that membership policy.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

   (a) I do not know if there is one. If there is, I had no contact with it.

   (b) I was asked by Mr. Markman at the Justice Department if I was interested. I said yes, and I was spoken to by a number of Justice Department attorneys.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

   No.

5. Please discuss your views on the following criticism involving "judicial activism."

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

   Some of the characteristics of this "judicial activism" have been said to include:

   a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

   b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Discussion:

I believe that what is sometimes called judicial activism arises when judges attempt to rely on their own personal notions of policy when they make rules. Decisions based on policy should be left to the political branches of the government. When courts establish new rules, those should be grounded on principles found in the law.

If judges do turn to policy making, they then almost inexorably begin behaving like legislators, and the vices of activism become apparent. For example: they may begin seizing legislative power directly by amending statutes or even constitutions; their craftmanship may be seriously affected because policy making does not necessarily lend itself to closely reasoned judicial opinions; and since their focus becomes policy for the future rather than the plight of the individuals before them, they may reach out and decide moot cases. They may even abandon the traditional idea of the retroactivity of judicial decision making and adopt the prospective form that is usually found in legislation. Finally, they may well seek to encourage that other concomitant of the legislative process--lobbying. This can be (and is) accomplished by fostering a great proliferation of so-called amicus briefs by organizations that have particular political points of view.

Principled decision making, on the other hand, does not tend to foster these problems because the courts are doing what they are uniquely competent and surely empowered to do. That is, they are adjudicating the rights of those who come before them by relying on our perceived legal traditions and principles, as updated by policy determinations by the political branches of our government and the by the customs and mores of our society. In so doing, justice is done in individual cases, the rule of law is adhered to, like cases are treated alike, and the decisions of the courts do not come as a shock or surprise to the citizens.

In short, I do not believe that judges have discretion to choose any answer that appeals to them personally when they are faced with a difficult legal issue. Their duty is to try to seek the right answer and to give that answer when they have found it. That requires them to do their best to understand the principles that inform the law in our society, and to apply those principles to deciding the cases before them.

NOT FOR PUBLICATION

FILED
APR 18 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARRY A. BENEWICK, JR.,	)	
Plaintiff-Appellant,	)	No. 86-5523
v.	)	D.C. No. CV 84-9144 (RG)
THE LIMITED STORES, LANE BRYANT, INC., and LANE BRYANT REGIONAL STORES DIVISION,	)	ORDER
Defendants-Appellees.	)	

Before: ANDERSON and CANBY, Circuit Judges, and WEIGEL,* District Judge

This appeal is resubmitted for decision.

The decision of the district court is VACATED for lack of jurisdiction and the district court is directed to remand the case to the state court from which it was improperly removed. *See* *Bryant v. Ford Motor Co.*, Nos. 84-6389 and 85-5698 (en banc) (slip op. as amended April 15, 1988).

IT IS SO ORDERED.

A TRUE COPY
ATTEST MAY 12 1988
CATHY A. CATTERSON
Clerk of Court
by: R. Caldwell
Deputy Clerk

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*The Honorable Stanley A. Weigel, Senior United States District Judge for the Northern District of California, sitting by designation.

AO-10
Rev. 8/87

FINANCIAL DISCLOSURE REPORT

Annual F Due by May 15 from Judicial Officers and certain Ju l Employees (28 USCA App. I §§ 301-09)

Person Reporting (Last name, first, middle initial) Fernandez, Ferdinand F	Court or Organization Court of Appeals, Ninth Circuit	Date of Report Mar 1 1989
Title Judge	Date of Entry/Nomination/Termination (only if initial or final report) Feb. 28, 1989	Reporting Period (Calendar year, or inclusive dates) Jan. 1, 1988 to Feb 28, 1989
Home or office address 312 No Spring St., Los Angeles, Cal. 90012		

IMPORTANT NOTES: *Please read the instructions accompanying this form. The report should include information pertaining to your spouse and dependent children, if any. Attach additional sheets if needed identifying each attachment by showing your name, the date of the report, and the section(s) being completed.* **Complete all sections, checking the NONE box for each section where you have no reportable information.** *Compare and reconcile this report with last year's and list items in the same order as last year. Type or print clearly. Sign on last page.*

I. POSITIONS. *(Reporting individual only; see pp. 15-16 of Instructions.)*

POSITION	NAME OF ORGANIZATION/ENTITY
☐ NONE (No reportable positions)	
Trustee	Magdalena von Stauffen Trust (a to a partial interest in a home in Clifton, Ariz.) Resigned 3/28/88; effective 4/27/88

II. AGREEMENTS. *(Reporting individual only; see p. 17 of Instructions.)*

DATE	PARTIES AND TERMS
☐ NONE (No reportable agreements)	
1972	American Bar Assn. Retirement Plan, maintained by Allard, Shelton & O'Connor. This is a Keogh Plan. No contributions made since I left firm in 1980.

III. NON-INVESTMENT INCOME. *(Partial disclosure for spouse; see pp. 18-20 of Instructions.)*

DATE (Honoraria only)	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
☐ NONE (No reportable non-investment income)		
1	Spouses' wages from Chaffey College,	$
2	Alta Loma, Calif	$
3		$
4		$
5		$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
Fernandez, Ferdinand F	3/1/89

IV. REIMBURSEMENTS and GIFTS--transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

☐ NONE (No such reportable reimbursements or gifts)

	SOURCE	DESCRIPTION
1	Association of Business	I was a speaker at Association
2	Trial Lawyers	Conference in Hawaii, and the
3		Association paid expenses of
4		me and spouse — including
5		transportation, food & lodging.
6		
7		
8		

V. OTHER GIFTS.

(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

☐ NONE (No such reportable gifts)

	SOURCE	DESCRIPTION	VALUE
1	West Publishing Co	Books	$ 292.00
2			$
3			$
4			$

VI. LIABILITIES.

(Includes those of spouse and dependent children; see pp. 22-24 of Instructions.)

☒ NONE (No reportable liabilities)

	CREDITOR	DESCRIPTION	VALUE CODE*
1			
2			
3			
4			
5			
6			
7			

* VALUE CODES J = $0 to $1,000 K = $1,001 to $5,000 L = $5,001 to $15,000 M = $15,001 to $50,000 N = $50,001 to $100,000 O = $100,001 to $250,000 P = over $250,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting: Fernandez, Ferdinand

Date of Report: 3/1/89

VII. INVESTMENTS and TRUSTS--income, value, transactions. (Includes those of spouse; partial disclosure for dependent children; see pp. 24-35 of Instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during period		C. Gross value at end of period		D. Transactions during period (Reporting individual and spouse)				
						If not exempt from disclosure			
	Amt Code[1] (A-H)	Type (e.g., div.)	Value Code[2] (J-P)	Value Method Code[3] (Q-W)	Type (e.g., sold)	Date Month-Day	Value Code[2] (J-P)	Gain Code[1] (A-H)	Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1 Accts at Pomona First Fed S&L, Upland, Cal (J)	E	INT.	N	T					
2 Accts at Security Pac. Nat. Bank, Upland & Alta Loma Cal. (J)	D	INT	M	T					
3 Irvine Ranch Water Dist Bonds (J)	B	INT	L	T					
4 Magdalena von Staufen									
Trust (I am a									
Contingent remainder									
beneficiary)									
(a) Wells Fargo Common	A	None	O	T					
Trust Funds [Wells Fargo									
Bank, Trustee]									
(b) 1/15 interest in home	A	None	K	W					
in Clifton, Ariz [C. Sprzia,									
Trustee]									
5. ABA Keogh Plan (J)	D	UNIT Equity	M	T					
6 Bankers United Tax	E	INT	N	T					
Sheltered Annuity									
7. Pacific Fidelity Tax	B	INT	K	T					
Sheltered Annuity									
19									
20									

1 Income/Gain Codes: A = exempt ($0 to $100) B = $101 to $1,000 C = $1,001 to $2,500 D = $2,501 to $5,000 E = $5,001 to $15,000 F = $15,001 to $50,000 G = $50,001 to $100,000 H = over $100,000

2 Value Codes: J = exempt ($0 to $1,000) K = $1,001 to $5,000 L = $5,001 to $15,000 M = $15,001 to $50,000 N = $50,001 to $100,000 O = $100,001 to $250,000 P = over $250,000

3 Value Method Codes: Q = Appraisal R = Cost (real estate only) S = Assessed value T = Cash/market U = Book value V = Other W = Estimated

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting: FERNANDEZ, FERDINAND

Date of Report: Mar 1 1989

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate section of Report.)

☐ **Check to affirm that differences in investments from those reported in prior year are exempt from disclosure.**

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

Signature

Date Mar 1, 1989

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (28 U.S.C.A. APP. I, § 304, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS

1. Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

2. Deliver one copy to the Clerk of the Court on which you sit or serve. (Judicial employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center, need not file a copy with any court.)

FINANCIAL STATEMENT

NET WORTH

"EXHIBIT "A""

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	106864	44	
U.S. Government securities—add schedule	0	00	
Listed securities—add schedule	0	00	
Unlisted securities—add schedule	9500	00	(1)
Accounts and notes receivable:			
Due from relatives and friends	0	00	
Due from others	0	00	
Doubtful	0	00	
Real estate owned—add schedule	175 000	00	(2)
Real estate mortgages receivable	0	00	
Autos and other personal property	75000	00	
Cash value—life insurance	0	00	
Other assets—itemize:			
Tax Sheltered Annuity	85628	82	
Trust	0	00	(3)
Total assets	451993	26	

LIABILITIES			
Notes payable to banks—secured	85885	00	(4)
Notes payable to banks—unsecured	0	00	
Notes payable to relatives	0	00	
Notes payable to others	0	00	
Accounts and bills due	3183	09	(5)
Unpaid income tax	0	00	
Other unpaid tax and interest	0	00	
Real estate mortgages payable—add schedule	0	00	(4)
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	89068	09	
Net worth	362925	17	
Total liabilities and net worth	451993	26	

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor	0	00	
On leases or contracts	0	00	
Legal Claims	0	00	
Provision for Federal Income Tax	0	00	
Other special debt	0	00	

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	No		
Are you defendant in any suits or legal actions?	Yes		(6)
Have you ever taken bankruptcy?	No		

(1) IRVINE Ranch Water District Bonds - Face Value - $10,000.00

(2) Home at 117 W Arrow Hwy, Upland, Cal.

(3) I have a contingent remainder interest in Magdalena Vom Staufen Trust, from which I derive no income and have no right to principal.

(4) Note secured by Deed of Trust on home at 117 W Arrow Hwy, Upland, Calif. Holder: Bank of America

(5) Total on Credit Cards

(6) Three actions against all Judges of US Dist Court C.D. Cal, which claim that attorney admission rules are unconstitutional; and one against me because I am judge in removed Social Security case. Estimated liability - zero.

EXHIBIT A

AFFIDAVIT

State of California)
) SS
County of Los Angeles)

I, FERDINAND F. FERNANDEZ, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Mar 9 1989
DATE

NAME

Subscribed and sworn to before me this 9th day of March, 1989.

NOTARY

OFFICIAL SEAL
XAVIER MIRELES
My Commission Expires March 2, 1990

AMERICAN BAR ASSOCIATION
Standing Committee on
Federal Judiciary
1800 M Street, NW
Washington, DC 20036
(202) 331-2230

CHAIRMAN
Harold R. Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
William E. Willis
125 Broad Street
New York, NY 10004

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
Suite 322A
6160 Kempsville Circle
Norfolk, VA 23502

FIFTH CIRCUIT
Lloyd Lochridge
Suite 1300
919 Congress Avenue
Austin, TX 78701

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
Suite 4300
One IBM Plaza
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
Post Office Box 80268
1815 Y Street
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
40th Floor
1201 Third Avenue
Seattle, WA 98101-3099
Ronald L. Olson
35th Floor
355 South Grand Avenue
Los Angeles, CA 90071

TENTH CIRCUIT
Arthur D. Melendres
Sunwest Building
Suite 1000
Post Office Box 2168
Albuquerque, NM 87103

ELEVENTH CIRCUIT
Sylvia H. Walbolt
Post Office Box 3239
Tampa, FL 33602

DISTRICT OF COLUMBIA
CIRCUIT
James J. Bierbower
1308 19th Street, NW
Washington, DC 20036

FEDERAL CIRCUIT
John D. Lane
Suite 1100
1666 K Street, NW
Washington, DC 20006

BOARD OF GOVERNORS
LIAISON
Robert MacCrate
28th Floor
125 Broad Street
New York, NY 10004

STAFF LIAISON
Irene R. Emsellem
American Bar Association
1800 M Street, NW
Washington, DC 20036
(202) 331-2210
ABA/NET ABA 461

September 30, 1988

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: FERDINAND F. FERNANDEZ
United States Court of Appeals
for the Ninth Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Ferdinand F. Fernandez for appointment as Judge of the United States Court of Appeals for the Ninth Circuit.

Our Committee is of the unanimously of the opinion that Ferdinand Fernandez is "Well Qualified" for this appointment.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

SHIRLEY DANIEL PETERSON

Birth:	September 3, 1941	Holly, Colorado
Legal Residence:	Maryland	
Marital Status:	Married	Donald M. Peterson 2 children
Education:	1959 - 1963	Bryn Mawr College A.B. Degree
	1963 - 1967	New York University Law School LL.B. degree
Bar:	1967	New York
	1970	District of Columbia
Experience:	1967 - 1968	Bureau of National Affairs Legal Writer
	1969	Marine Midland Bank, N.A. Will Reviewer
	1969 - present	Steptoe & Johnson Associate (1969 - 1977) Partner (1978 - present)
Office:	1330 Connecticut Ave., N.W. Washington, D.C. 20036 (202) 429-6230	
Home:	6620 Elgin Lane Bethesda, Maryland 20817	

To be an Assistant Attorney General

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

   Shirley Daniel Peterson
   (nee Shirley M. Daniel)

2. Address: List current place of residence and office address(es).

   Residence: 6620 Elgin Lane
   Bethesda, Md. 20817

   Office: 1330 Connecticut Avenue, N.W.
   Washington, D.C. 20036

3. Date and place of birth.

   September 3, 1941
   Holly, Colorado

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Married; Donald M. Peterson; retired

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Bryn Mawr College, 1959-1963
   A.B. 1963

   New York University Law School
   September 1963 - January 1967
   LL.B. 1967

6. Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

   Steptoe & Johnson, 1969- present
   Associate 1969-1977
   Partner 1978-present

   Marine Midland Bank, N.A., 1969

   Bureau of National Affairs, 1967-1968

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

   I was awarded scholarships by both Bryn Mawr College and New York University Law School. I graduated cum laude from both Bryn Mawr and N.Y.U., was an N.Y.U. Honor Scholar, member of the Order of the Coif, and staff member of the Annual Survey of American Law.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

   American Bar Association
      Tax Section
         Chair, Estate and Gift Tax Committee, 1988-1989

      Real Property, Probate & Trust Law Section

   Tax Court Judicial Conference - 1988

   American College of Probate Counsel
      Board of Regents - 1988-1989
      Chair, Transfer Tax Study Committee, 1986-1989
      Nominating Committee - 1988
      Estate and Gift Tax Committee - 1987-1989

   Assistant Attorney General's Advisory
      Committee on Tax Litigation, 1982-1984

   D.C. Bar Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

   In addition to the organizations listed in item 9, I belong to the Bryn Mawr Club of Washington, the D.C. Estate Planning Council, the Sulgrave Club, and Farmington Country Club. To the best of my knowledge, none of these organizations is active in lobbying before public bodies.

11. *Court Admission*: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Court of Appeals for the District of Columbia Circuit	9-15-70
Supreme Court of the United States	7-19-82
United States Tax Court	3-18-77
United States Claims Court	6-30-82
New York Court of Appeals	6-23-67
Court of Appeals for the Federal Circuit	10-1-82

12. *Published Writings*: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Publications:

"Valuation Penalties: Pitfalls and Planning," 12 *Probate Notes* 41 (Summer 1986)

"Savings Clauses in Wills and Trusts," *Tax Management Estates, Gifts and Trusts Journal*, Vol. 13, No. 3

Federal Tax Valuation Digest (1989 Cumulative Edition), Warren, Gorham & Lamont, publication expected October 1989

Speeches:

"Section 2036(c): Transfer Tax and the Family Enterprise"

"Valuation Issues in an Era of Anti-Freeze [Section 2036(c)] and Valuation Penalties [Sections 6659 and 6660]"

"Valuation of Closely Held Stock: Aggregation Theory, Control Premiums and Minority Discounts"

"The [illegible]/Expert/Practitioner Penalties
Applied to Charitable Contributions
and Estate and Gift Tax Valuations"

"Valuation of Property: Planning, Pitfalls,
and Penalties"

"The Impact of the Tax Reform Act of 1986
on Estate Planning"

13. Health: What is the present state of your health? List the date of your last physical examination.

    Excellent; April 10, 1989

14. Public Office: State (chronologically) any public offices you h ave held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

    None

15. Legal Career:

    a. Describe chronologically your law practice and experience after graduation from law school including:

        1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

            I did not serve as a judicial clerk.

        2. whether you practiced alone, and if so, the addresses and dates;

            I never practiced alone.

        3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

            Steptoe & Johnson
            1330 Connecticut Avenue, N.W.
            Washington, D.C. 20036
                Associate 1969-1977
                Partner 1978-Present

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

I have been a member of the tax group since my arrival at Steptoe in 1969. My practice has been divided between tax litigation, tax planning, and estate planning and administration. The period 1969-1977 was devoted primarily to estate planning and transfer tax controversy work. From 1978 to 1985, my practice concentrated almost exclusively on tax litigation. From 1986 to the present, I have devoted most of my time to tax planning work and some controversy work.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My clients have included both large corporations and individuals. For example, I have participated in tax litigation or controversy work on behalf of Union Pacific Corporation, Burlington Northern, Inc., ARCO, and the AAR. I have also specialized in estate planning and administration and, in that connection, have represented many individual clients.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

I have not appeared in court frequently. Although I have devoted a substantial portion of my career to tax litigation, all of my cases settled prior to trial. My court appearances were limited to motions, were in the federal courts, and were related to civil cases.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

See response to Item 17 below.

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did no involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

A substantial portion of my career has been devoted to handling large tax litigation matters. We represented, inter alia, Union Pacific Corporation and Burlington Northern Inc. in several cases covering many different tax years, entities, and issues. The preparation of these cases for trial spanned several years, involved numerous expert and factual witnesses and extensive trial preparation, including the taking and defense of many depositions.

The Union Pacific cases initially involved approximately 50 different legal issues and 27 tax years. Most of these issues were resolved, leaving as the principal issue in the case the depreciability of the railroad's investment in grading and tunnel bores. This issue was also ultimately settled.

We subsequently handled a similar case for Burlington Northern. The BN representation was complicated by the fact that the tax years at issue related to BN's predecessor railroads, the Great Northern and the CB&Q. At one point in time, litigation was proceeding simultanteously in several different forums, including the Claims Court and the Federal District Court for the District of Minnesota. Again, those cases were resolved successfully prior to trial.

In both the Union Pacific and Burlington Northern cases, I was one of the principal attorneys responsible for the trial preparation, including the development of expert and taxpaper reports and testimony and discovery activity.

In addition to the litigation matters described above, I have participated in numerous tax controversy matters. I was part of a team of lawyers at Steptoe & Johnson responsible for the preparation of a protest on behalf of ARCO, which encompassed some 33 legal issues. I have prepared briefs and have represented clients in the audit of federal tax returns and subsequent administrative proceedings.

Most recently, I have been involved in tax planning for individuals, trusts and corporations. In these matters, our representation is not a matter of public record (as is the case with the litigation matters) and the ethical obligation of confidentiality precludes identification of these clients.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   My interest in the Steptoe & Johnson retirement plan is vested. The actuarial value of my interest in the plan was $69,787.61 on April 14, 1989. With the exception of my interest in this retirement plan, I have no deferred income arrangements with anyone. Further, I have no arrangements to be compensated subsequent to the date of my withdrawal from Steptoe & Johnson.

   Upon my withdrawal from Steptoe & Johnson, I will receive (1) my proportionate share (computed to the date of my withdrawal from the Firm) of my budgeted partner compensation for 1989 (reduced by prior drawings and individual expenses charged to my personal account); (2) the full balance of my capital account; and (3) a severance payment.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   My husband and I have met with representatives of the Justice Department, regarding the ethics requirements. They have advised us that certain publicly-traded stock should be sold in order to permit my participation in a tax case involving that company, and we have agreed to sell that stock. We will either sell the stock in any company where a conflict is presented, I will recuse myself from any matter involving that company, or, if appropriate, I will seek a waiver. I have provided Justice Department officials with a list of all companies in which I, my husband, children or trusts of which I am trustee, own stock. I will establish procedures within the Tax Division to ensure compliance with all ethical rules and guidelines, as it is my intent to comply scrupulously with the law.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during you service in the position to which you have been nominated? If so, explain.

   No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   A copy of my Financial Disclosure Form is attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

   See attached

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   No

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

    I have performed pro bono work for a number of organizations and individuals over the years. I handled legal work, on a pro bono basis, for an organization known as Wider Opportunities for Women, and I have also represented the Bryn Mawr Club of Washington on a pro bono basis. Although I do not recall the exact number of hours involved in these representations, I do know that both involved a significant commitment of time. Over the years, I have frequently responded to requests for assistance from organizations and individuals seeking help with tax and estate planning matters, and I have rendered legal assistance, without pay, in numerous instances.

    I served as court-appointed counsel for a minor who was an habitual run-away and as the supervising partner of several cases involving the termination of parental rights. Our Firm's records indicate that I have been involved in about 17 pro bono cases since 1981.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

    I belong to the Sulgrave Club. Although the Sulgrave Club is generally regarded as a woman's club, I believe it has some male members.

FINANCIAL STATEMENT *

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	717,909	Notes payable to banks—secured	None
U.S. Government securities—add schedule	415,465	Notes payable to banks—unsecured	None
Listed securities—add schedule	640,392	Notes payable to relatives	None
Unlisted securities—add schedule	None	Notes payable to others	None
Accounts and notes receivable:		Accounts and bills due	None
Due from relatives and friends	None	Unpaid income tax	221,00
Due from others	None	Other unpaid tax and interest	None
Doubtful	None	Real estate mortgages payable—add schedule	None
Real estate owned—add schedule	900,000	Chattel mortgages and other liens payable	None
Real estate mortgages receivable	None	Other debts—itemize:	None
Autos and other personal property	100,000		
Cash value—life insurance	None		
Other assets—itemize:	None		
		Total liabilities	221,000
		Net worth	2,552,766
Total assets	2,773,766	Total liabilities and net worth	2,773,766

CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule.)	No
On leases or contracts	None	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	212,708		
Other special debt	None		

Shirley D. Peterson

U.S. GOVERNMENT SECURITIES

U.S. Treasury Bills		4/13/89	296,700
U.S. Treasury Notes	14.5%	5/15/91	16,546
U.S. Treasury Notes	14.5%	7/15/89	15,262
U.S. Treasury Notes	13 1/8%	5/15/94	34,344
U.S. Treasury Notes	14.5%	7/15/89	15,271
U.S. Treasury Bonds	8 1/4%	5/15/90	9,853
U.S. Treasury Growth Receipts		5/15/2000	27,489
			415,465

Shirley D. Peterson

LISTED SECURITIES OWNED BY CANDIDATE AND IMMEDIATE FAMILY

Company	Value
ALLTEL	17,192
American Home Products	8,637
Baltek	25,375
Baltimore Gas & Electric	24,700
Bell Atlantic	7,312
Bemis	20,400
Carter Wallace	32,375
Donnelley RR & Sons	10,987
Duke Power	8,675
Fabricand	14,700
Florida Progress	13,575
Ford	31,025
General Electric	31,875
Johnson & Johnson	8,625
Juno Lighting	10,950
Liz Claiborne	17,450
Lindal Cedar Homes	10,175
Martin Lawrence Editions	6,450
Minnesota Mining & Mfg.	13,025
Monsanto	35,450
NAPCO Security Systems	16,500
Philip Morris	10,800
Pitney Bowes	8,475
Southern California Water	13,125
Southwestern Bell	6,543
State O Maine	8,125
State Street Boston	55,500
Superior Industries	50,710
Thermo Electron	38,824
Tucson Electric	9,250
Upper Peninsula Power	10,200
Wolohan Lumber	45,800
A portion of the candidate's Cash and Deferred Pension Plan is invested in a fund managed by Sanford, Bernstein. (This will be liquidated shortly.)	17,587

Shirley D. Peterson

REAL ESTATE

(Estimated Fair Market Value)

6620 Elgin Lane Bethesda, Maryland	850,000
3015 13th Street Greeley, Colorado	50,000

CAROL T. CRAWFORD

Birth:	February 25, 1943	Mt. Holly, New Jersey
Legal Residence:	Virginia	
Marital Status:	Married	Ronald Crawford 3 step-children
Education:	1961 - 1965	Mt. Holyoke College B.A. degree
	1975 - 1978	American University Washington College of Law J.D. degree, *magna cum laude*
Bar:	1978 1979	Virginia District of Columbia
Experience:	1979 - 1981	Collier, Shannon, Rill & Scott Associate
	1981 - 1983	Federal Trade Commission Executive Assistant to the Chairman
	1983 - 1985	Federal Trade Commission Director, Bureau of Consumer Protection
	1985 - 1989	Office of Management and Budget Associate Director for Economics & Government
	4/1989 - present	Department of Justice Acting Asst Attorney General Office of Legislative Affairs
Office:	10th & Constitution Avenue, NW Room 1603 Washington, D.C. 20530 202 633-2141	
Home:	6204 Long Meadow Road McLean, Virginia 22101	

To be an Assistant Attorney General

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Carol Tallman Crawford
Carol Lynn Tallman (maiden)

2. Address: List current place of residence and office address(es).

Home: 6204 Long Meadow Road
McLean, Virginia 22101

Office: U.S. Department of Justice
Office of Legislative Affairs
9th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

3. Date and place of birth.

September 25, 1943
Mt. Holly, New Jersey

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Spouse: Ronald Crawford

Occupation: Consultant-Self Employed
F/P Associates
1700 K Street, N.W., #404
Washington, D.C. 20006

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Mt. Holyoke College
South Hadley, Massachusetts
9/61-6/65
B.A. (1965)

University of Virginia
Course at Northern Virginia Campus (Arlington, Va.)
1/75 - 5/75

Washington College of Law
American University
Washington, D.C.
8/75-6/78
J.D., Magna Cum Laude (1978)

6. Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

10/85 to 01/89	Associate Director for Economics & Government Office of Management and Budget 17th & Pennsylvania Avenue, N.W. Washington, D.C. 20500
4/83 to 10/85	Director, Bureau of Consumer Protection Federal Trade Commission 6th & Pennsylvania Avenue, N.W. Washington, D.C. 20580
10/81 to 4/83	Executive Assistant to the Chairman Federal Trade Commission 6th & Pennsylvania Avenue, N.W. Washington, D.C. 20580
7/79 to 10/81	Attorney Collier, Shannon, Rill & Scott 1055 Thomas Jefferson St., N.W. Washington, D.C. 20007
6/77 to 8/77	Summer Law Clerk Hamel, Park, McCabe & Saunders (firm is now Hopkins, Sutter, Hamel & Park) 888 16th Street, N.W. Washington, D.C. 20006
1/69 to 07/75	Legislative Assistant Senator Bob Packwood U.S. Senate Senate Office Building Washington, D.C. 20510
1/67 to 1/69	Departmental Assistant/Caseworker Cong. Robert Denney Longworth House Office Building Washington, D.C. 20515

8/66 to 1/67	Legislative Researcher Cong. Howard Callaway Longworth House Office Building Washington, D.C. 20515
5/66 to 8/66	Editorial Assistant Congressional Quarterly Washington, D.C.
8/65 to 5/66	Staff Assistant to Honorable Dorothy Elston Kabis, President National Federation of Republican Women Eisenhower Building Washington, D.C. 20003
7/85 to 12/88	Vice President
7/70 to 12/88	Director Columbus Shopping Center (family-owned business) Columbus, New Jersey

7. Military Service: Have you had any military service?

No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

J.D., *Magna Cum Laude*

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are, or have been a member, and give the titles and dates of any offices which you have held in such groups.

American Bar Association
Virginia Bar Association
District of Columbia Bar Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

American Bar Association
Virginia Bar Association
District of Columbia Bar Association
Phi Delta Phi (legal fraternity)
Executive Women in Government
Mt. Holyoke Club of D.C.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Virginia (October 1978)
District of Columbia Court of Appeals (October 1979)
Temporary Emergency Court of Appeals (November 1980)
United States Court of Appeals for the District of Columbia (October 1981)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech and they are readily available to you, please supply them.

Speech to American Conference on Dental Advertising and Public Relations - September 12, 1985

Speech to National Conference on Health Fraud - September 11, 1985

Statement before Subcommittee on Health and the Environment of the Committee on Energy and Commerce; U.S. House of Representatives - June 25, 1985

Speech to American Society of Plastic and Reconstructive Surgeons - June 6, 1985

Speech to National Advertising Review Board - December 5, 1984

Speech to American Bar Association, Antitrust Section - July 9, 1981

Speech to Fourth Annual Call-on-Congress of the New York State Broadcasters Association

(Text are attached.)

13. Health: What is the present state of your health?

Excellent

List the date of your last physical examination.

February 1989

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None

15. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

N/A

2. whether you practiced alone, and if so, the addresses and dates;

N/A

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

10/85 to 01/89	Associate Director for Economics & Government Office of Management and Budget 17th & Pennsylvania Avenue, N.W. Washington, D.C. 20500
4/83 to 10/85	Director, Bureau of Consumer Protection Federal Trade Commission 6th & Pennsylvania Avenue, N.W. Washington, D.C. 20580
10/81 to 4/83	Executive Assistant to the Chairman Federal Trade Commission 6th & Pennsylvania Avenue, N.W. Washington, D.C. 20580

7/79 to 10/81 Associate
Collier, Shannon, Rill & Scott
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007

6/77 to 8/77 Summer Law Clerk
Hamel, Park, McCabe & Saunders
(firm is now Hopkins, Sutter, Hamel & Park)
888 16th Street, N.W.
Washington, D.C. 20006

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

7/79 to 10/81 My law practice has been confined to the period that I was an associate with the firm of Collier, Shannon, Rill & Scott. During that time I counselled corporate clients and trade associations on contract, tax, antitrust and administrative law and represented clients before federal administrative agencies and the Congress.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Clients were individuals, trade associations, and a group of individual small royalty owners. Counselling was of general nature, involving a variety of contract, tax, antitrust and other issues. Administrative practice related primarily to oil and gas control regulations and involved meetings with and appearances before FERC and the Economic Regulatory Administration of the Department of Energy; Congressional practice focused primarily on windfall profit tax and on policy governing utilization of residual fuel oil in utility and other industrial boilers.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

The only litigation I handled while in private practice was before the Temporary Emergency Court of Appeals. My only appearance was the oral argument in Independent Oil Compounders Assoc v. Dept. of Energy, 650 F.2d 1230.

2. What percentage of these appearances was in:

   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

   Federal courts - 100%

3. What percentage of your litigation was:

   (a) civil;
   (b) criminal.

   Civil - 100%

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    (a) the date of representation;
    (b) the name of the court and name of the judge or judges before whom the case was litigated; and
    (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Independent Oil Compounders Assoc. v. Department of Energy, 650 F.2d 1230

I represented the Independent Oil Compounders Association (now the Independent Lubricants Manufacturers Association) in appeal of Energy Department's Economic Regulatory Administration ruling that petroleum-based lubricants are covered under petroleum regulations. I handled all filings and presented the oral argument. The court held that the lubricants were covered by the ERA regulations.

(a) Filed - 10/15/80
Closed - 5/26/81

(b) Temporary Emergency Court of Appeals. Sitting on the panel hearing the case were Judge Earl Larson, Judge Dudley Bonsal, and Judge John Peck

(c) Co-counsel:

John B. Williams
Collier, Shannon, Rill & Scott
1055 Thomas Jefferson St., NW
Washington, D.C. 20007
(202) 342-8400

Attorneys for appellees:

Dennis Dutterer
Assistant U.S. Attorney
Room 3437
U.S. Courthouse
Washington, D.C. 20001

Larry P. Elsworth
Floyd I. Robinson
Office of the General Counsel
Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585
(202) 252-5004
(202) 633-8622

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation. In this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

As Director, Bureau of Consumer Protection, Federal Trade Commission (1983-85):

1. Development and prosecution of a series of fraud cases, generally large scale interstate scams, such as boiler room operations, marketing real estate, gems or other investment "opportunities."

2. Development and litigation of series of cases aimed at fraudulent advertising and marketing of health care products.

3. Promulgation of regulations designed to proscribe certain state imposed restrictions on the commercial aspects of optician and optometry practice.

4. Clarification of FTC's criteria for findings that a product or service or its advertising is deceptive or unfair, or that its advertising lacks adequate substantiation.
5. Development of strategy, and initiation of cases to increase compliance with Truth in Lending law and regulations by real estate and automobile industries.

While in private practice (1979-81);

1. Appeal of ERA regulations on behalf of lubricant industry (1980-81)
2. Development and implementation of strategy to utilize residual fuel oil in industrial boilers (1979-81)

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I have already consulted with DOJ's ethics officer to identify potential conflicts of interest and have recused myself from all matters so identified. I plan to continue such consultations on an on-going basis. I will prepare memoranda to my staff and other DOJ staff as appropriate to provide notice of matters with respect to which I am recused.

   Current recusals: Matters specifically involving companies in which I own stock and the following: Northrop Corp; Strum-Ruger Corp; American Bus Association; Iron and Steel Institute; National Cable Television Association

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

   No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   See Attachment

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	483	659	00
U.S. Government securities—add schedule	61	427	00
Listed securities—add schedule	302	341	00
Unlisted securities—add schedule	100	000	00
Accounts and notes receivable: -			
Due from relatives and friends	17	500	00
Due from others	-	0	-
Doubtful	-	0	-
Real estate owned—add schedule	1,522	250	00
Real estate mortgages receivable	491	000	00
Autos and other personal property	325	000	00
Cash value—life insurance	-	0	-
Other assets—itemize: PG Ltd Ptnrship	75	000	00
IRAs & Keogh (cash)	212	429	00
Crawford Partners	11	500	00
Capital Preservation Growth Co.	155	189	00
Q.B. Partners	4	500	00
Total assets	3,761	795	00

LIABILITIES			
Notes payable to banks—secured	-	0	-
Notes payable to banks—unsecured	-	0	-
Notes payable to relatives	-	0	-
Notes payable to others	-	0	-
Accounts and bills due	-	0	-
Unpaid income tax	-	0	-
Other unpaid tax and interest	-	0	-
Real estate mortgages payable—add schedule	366	261	00
Chattel mortgages and other liens payable	75	000	00
Other debts—itemize:	-	0	-
Total liabilities	441	261	00
Net worth	3,320	534	00
Total liabilities and net worth	3,761	795	00

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor	35	000	00
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)			
Are you defendant in any suits or legal actions?			
Have you ever taken bankruptcy?			

U.S. Government Securities

U.S. Treasury's 1991 Bonds	51,437
U.S. Government Services "E" Bonds	10,000
	61,437

Listed Securities (Market 4/21/89)

200	Exxon Corporation	8,925
9205	BMJ Financial Corp.	175,842
200	Royal Dutch Petroleum	13,250
2100	Smithfield Foods	35,175
100	Sturm, Ruger & Co.	4,950
136	Tucson Electric Power Co.	4,726
100	Washington Bank Corp.	1,775
100	Northrop Corporation	2,737
	Fairfax Co. (VA) Gen. Oblig. Bonds	9,640
	Richmond (VA) Public Service G.O. Bonds	10,150
	Newport News (VA) G.O. Bonds	11,200
	Virginia State Public Bldg. Auth. Bonds	13,971
	Norfolk City (VA) G.O. Bonds	10,000
		302,341

Unlisted Securities

149,363	Ironwood Partners, Inc.	100,000

Real Estate Mortgages

Residence - McLean, VA (4/1/89)	295,910
Rental Property - Tempe, AZ (4/1/89)	70,351
	366,261

Real Estate Owned

Residence - McLean, VA	625,000
Rental Property - Tempe, AZ	78,000
30 acres land - Springfield, NJ - 50% ownership	180,000
105 acres land - Mansfield, NJ - 39% ownership	614,250
8 acres raw land - Springfield, NJ - 33½% ownership	20,000
1 acre raw land - Marin County, CA	5,000
	$1,522,250

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   1964 Presidential Campaign - Intern with Republic National Committee

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   While I have not participated in any organized legal aid programs, I have provided legal assistance to disadvantaged individuals on an ad hoc ban's. Examples include counselling legal aliens regarding the requirements of the new immigration law; negotiations over several months on behalf of a low income individual seeking reimbursement for food purchases made for a decedent, where the executor was resisting payment absent written proof of the obligation; negotiations with encyclopedia publisher on behalf of low income purchaser to re-negotiate contract to reduce debt service from contract.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership, what you have done to try to change these policies.

   1. Mt. Holyoke Club of Washington - Women's College Alumnae Association. I have been an inactive member for several years, and have not sought to change women-only policy.

   2. Executive Women in Government. I have been a member since about 1985. I am also an inactive member of this organization, and have not sought to change its women-only policy.

CONFIRMATION HEARING ON JAMES FRANKLIN RILL

THURSDAY, JUNE 15, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:41 a.m., in room SD-562, Dirksen Senate Office Building, Hon. Howard Metzenbaum presiding.

Also present: Senators Thurmond and Hatch.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The hearing will come to order.

The purpose of this hearing today is to consider the nomination of James F. Rill to be nominee for Assistant Attorney General of the Antitrust Division, Department of Justice. I welcome him and look forward to discussing with him important issues affecting antitrust enforcement.

I believe that another purpose of this hearing should be to reaffirm our commitment to enforcing the antitrust laws for the benefit of consumers, for the benefit of the economy, and for the benefit of the free enterprise system.

The antitrust laws are the original consumer protection statutes. They are based on very simple and fundamental principles that competition results in lower prices and more choices for consumers and that the government has an interest in preserving open competition.

Frankly, I take issue with the notion that a strong antitrust policy is a liberal idea. A belief in free competition follows from a belief in free enterprise. It is a simple equation: free enterprise equals free competition equals a strong antitrust policy. That is not a liberal viewpoint.

From Teddy Roosevelt to Gerald Ford, Republican Presidents supported vigorous antitrust enforcement. Unfortunately, the Reagan administration turned its back on the history of bipartisan support for the antitrust laws. It was a travesty. The antitrust laws have taken a beating in the last 8 years. The agenda of the Reagan administration even included a proposal to repeal the antitrust laws. Some have gone so far as to ask, is antitrust dead.

These are sad times for those of us who believe in free competition. I believe that we must reverse the trend of the last 8 years. We must commit ourselves to revitalizing the principles of free enterprise.

I am hopeful that James Rill's nomination to head the Antitrust Division is a signal that President Bush intends to break stride with his predecessor. While President Reagan chose theoreticians who believed in a form of blackboard antitrust, and who also came forward almost as soon as they hit the deck trying to change the antitrust laws, trying to change the decisions of the Supreme Court, on the other hand Mr. Rill has been a practicing antitrust attorney for all of his professional life. I hope that he makes use of some of his real-world experiences in this very important position as head prosecutor of the Antitrust Division.

I expect to support Mr. Rill's nomination. We may not always agree, and I will continue to push the enforcement agencies to do more. Nonetheless, I hope Mr. Rill will agree with me that consumers need to have confidence that we in Washington will do the right thing to promote competition.

I have told Mr. Rill when we met in my office that I have some real concerns about some of the oligopolies that have developed in this country and that I would hope we might fashion new concepts, new approaches with respect to oligopoly pricing.

I am very happy to see we have with us this morning the ranking member of this committee and another distinguished member of the committee. Senator Thurmond, we would be happy to hear from you first, sir.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, we have looked into the record of this fine gentleman and we think he meets all the requirements and qualifications, and we will be glad to support his nomination.

I have no further statement. I will have some questions.

Senator METZENBAUM. Senator Hatch.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman. I am pleased to be here today for the nomination hearing of James Rill to be the Assistant Attorney General for the Antitrust Division at the Department of Justice. I am also happy to welcome my friend, Beverly Byron, the Congresswoman from Maryland, with us as well.

Mr. Rill, in my opinion, is an excellent candidate for this position. He has a solid, traditional antitrust background. He is a solid, traditional antitrust lawyer. He has practiced in this area of law for many, many years. In fact, he expressed to me that he has spent his life in antitrust, which is rare in many ways.

He has been actively engaged in the American Bar Association antitrust section, where he recently served as chairman. He was also a founder and member of the ABA section of antitrust law special committee to study the role of the FTC.

Mr. Rill comes to us highly recommended from many who are active in the field of antitrust law. His extensive background in the field makes him particularly well suited for this position, and I have to say I look forward to hearing his testimony and views about the Department's proper role in the enforcement of this very important area of the law. And I would just like to say that I have known a lot about him and, frankly, I have a very high opinion of him as an individual and as an attorney.

I can't stay. I don't think either Senator Thurmond or I—I can't speak for Senator Thurmond, but I can't stay because we have a conference with the minority leader that starts at 10 o'clock. But if I could just say some things I am concerned about, I can do it in less than 1 minute, I believe, or less than 1½ minutes.

Senator **Metzenbaum**. No problem.

Senator **Hatch**. You might give some consideration to these, Mr. Rill. Recently, I have been contacted with respect to the modification of consent decrees and, you know, I am concerned about your viewpoints on consent decrees and, you know, what your decision would be and what you would do about considering a request to reopen those decrees. And I would hope that in the future you would consult with this committee if the Department were ever to begin a reconsideration of this particular issue.

And then I would also like to have you answer the question, if you could, for us whether or not you anticipate any major changes in the manner in which the Department will enforce the antitrust laws under your direction and I think that probably will be more than adequately covered by the distinguished chairman of this committee today, and I will look forward to whatever you have to say there, plus all the rest of your testimony and answers to questions.

So I support you, and intended to from the beginning, and even though we may disagree in some areas of antitrust law—I am not quite sure where they are, but there are a couple where we will probably have some differences—I have the highest opinion of your expertise and legal ethics and ability. And I just want you to know that and that is why I came over to formally and publicly express this.

Again, welcome, Congressman Byron. We are glad to have you with us.

Senator **Metzenbaum**. Thank you, Senator Hatch.

We are very happy to have Congresswoman Beverly Byron with us, and we would ask her and Mr. Rill to come to the table at the present time.

STATEMENT OF HON. BEVERLY BYRON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mrs. **Byron**. Good morning, Mr. Chairman.

Senator **Metzenbaum**. We are happy to have you here.

Mrs. **Byron**. Thank you very much. I am delighted to be here, and it gives me a great deal of pleasure to introduce to this committee my longtime friend, Jim Rill. Jim and I go back quite a number of years, having graduated from St. Alban's the same year I graduated from National Cathedral School here in Washington in 1950. So I think our friendship is one that is long-time.

He lives in Potomac, and therefore he is a constituent. His parents were born in Hampstead, MD, and therefore he is a long-term Marylander. And I have known and watched his career over the years develop as a very prominent, outstanding attorney in his field, and one that I have the utmost respect for.

As you know, we look beyond a career; we look back to the family values. And I would like to say that his son, Derek, has worked for me as an intern. He is now a journalist. His other son is here with him today, as is his wife, and I have known the family for a long time.

So it gives me a great deal of pleasure and a great honor to introduce not only a constituent, but one that I have known long and well. From the committee's viewpoints, from your opening statements, I think he is on a roll and if I am smart, I will be quiet and leave. But I did want to give you my input to this young gentleman that you have before you today.

Senator METZENBAUM. We are delighted to have you with us, Congresswoman, and your recommendation carries a lot of weight with us. If you would like to stay, we would be very happy to have you stay. Did you say that you had gone to St. Alban's or that both of you——

Mrs. BYRON. No. He had gone to St. Alban's and we would meet in the Bishop's Garden, neutral territory. [Laughter.]

Let me apologize——.

Senator METZENBAUM. I just left St. Alban's an hour ago, but not the church, the tennis court.

Mrs. BYRON. Same difference.

If you will excuse me, we are doing something to the savings and loan industry on our side of the Hill today.

Senator METZENBAUM. I have heard of that.

Mrs. BYRON. You have heard of that. But, anyhow, thank you very much for this opportunity.

Senator METZENBAUM. Thank you for being with us.

Mr. RILL. Thank you very much.

Mrs. BYRON. Good luck.

Senator METZENBAUM. Mr. Rill, we are happy to have you with us and we would be happy to have you introduce your family, if you would.

Mr. RILL. Thank you very much, Senator. I have with me today——

Senator THURMOND. You didn't call on me for this witness. Did you forget? The witness who just testified—did you want to give me a chance to say anything?

Senator METZENBAUM. I would give you a chance to say anything any time, any place, anywhere.

Senator THURMOND. You are not getting senile, are you?

Senator METZENBAUM. I would never deny—— [Laughter.]

Well, we young fellows find that to be a problem.

Senator THURMOND. I just want to say it is a delight to have you here.

Mrs. BYRON. Thank you, Senator.

Senator THURMOND. Any woman as intelligent and attractive as you are carries great weight with this committee. Thank you very much. [Laughter.]

Mrs. BYRON. I will leave while I am ahead.

Mr. RILL. I wish I could. [Laughter.]

STATEMENT OF JAMES FRANKLIN RILL, TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. RILL. Senator, thank you very much, and I deeply appreciate my friend, Mrs. Byron's, kind remarks. I have with me today my wife of 32 years yesterday, Betsy. Would you stand up?

[Ms. Rill stood.]

Mr. RILL. She has had to have an enormous sense of humor over the years to put up with the travails of a practicing lawyer, particularly one who has focused so much on it as I have, and she has been a great sustenance to me.

I also have here today my older son, Jimmy, who is 30 years old, an architect; like his father, a graduate of Dartmouth College. And I was interested when—sometimes as we prepare for these hearings, we punch out these computer sheets, and I was just looking to see what came up on the computer sheet. Around about 1981, it turns out that Jim Rill signed as a free agent with the New England Patriots. I want to assure you that is not I.

It is with regret that I have to say that Jimmy's wife, Mary, is not with us today. She is down in Richmond running a program for the Office of Personnel Management, for whom she is an investigator, and I guess now a program runner.

Then I also regret that my younger son, Derek, who is 27 years old, a graduate of DePauw University, is unable to be here today, but he is, on Saturday, getting his master's degree in journalism from Madill School at Northwestern.

Senator METZENBAUM. Is he going to cover the Antitrust Department as a journalist?

Mr. RILL. I think not. I know that my daughter-in-law had to recuse herself from Justice Department matters when I was going through the paperwork process. Derek is, I think, much too smart to cover legal matters. He will end up being a sports writer; that is his objective.

Senator METZENBAUM. We are very happy to have you with us, and your family. We are sorry that parts of them are not with us, but we look forward to having questions with you, but thought you might like to make an opening statement.

Mr. RILL. Senator, I really don't have any formal opening statement.

Senator THURMOND. Mr. Chairman, can I interrupt just a moment?

Senator METZENBAUM. Surely.

Senator THURMOND. We are having a caucus at 10 o'clock, if you will excuse me, and I would like to ask permission to let him answer my questions for the record, if you will just answer those for the record. Thank you, Mr. Chairman.

Senator METZENBAUM. Without objection.

[The questions of Senator Thurmond along with responses follow:]

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 1:

Mr. Rill, as you may know, Senator Leahy and I have recently introduced a bill amending the National Cooperative Research Act of 1984 to include manufacturing. Among other things, the purpose of this legislation is to promote American competitiveness and technological innovation. I would appreciate hearing your views on the effectiveness of the 1984 Act, and the need for extending it to include production activities. In addition, would you comment on whether you have any preference for the procedure to be used, that is, would you prefer the more extensive certification process as proposed in the Boucher/Campbell bill, or the notification procedure we have proposed, which is currently employed in the 1984 Act?

ANSWER:

One of the most imposing challenges facing America business is establishing and maintaining a competitive edge in global markets. It has been suggested that cooperative production joint ventures among U.S. manufacturers might in fact improve U.S. efficiency and ability to compete worldwide. It has also been suggested that manufacturers' fear of antitrust liability deters the formation of these production joint ventures. Although the Administration does not as yet have a position on this issue, the Attorney General has indicated interest in exploring antitrust legislation that will alleviate the concerns which may be deterring the formation of legitimate joint production ventures. At least two approaches have been advanced. One, as introduced by you and Senator Leahy, is modeled after the Research and Development Cooperation Act, and would provide for rule-of-reason treatment for production joint ventures of which the government is notified and immunize them against treble damages. I understand that the Research and Development Cooperation Act has been effective;

more than 125 notifications covering a wide range of research and development activities have been filed since the Act went into effect. Another possibility, as proposed in the bill sponsored by Representatives Boucher and Campbell, is patterned after the Export Trading Company Act. It would bar all antitrust damage suits against joint ventures certified by the Government.

While the Administration has not taken a position on any particular bill, the issues addressed by this legislation would be among my highest priorities.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 2:

Mr. Rill, would you identify any key area, or areas, that you intend to emphasize during your tenure as Assistant Attorney General?

ANSWER:

In my antitrust practice, I have been substantially involved in litigation on behalf of plaintiffs as well as defendants. I have increasingly appreciated the importance of case-by-case litigation to the direction of antitrust law. Therefore, if confirmed, my first goal will be to promote the most effective, efficient law enforcement program possible, in both the criminal and civil fields. For example, I intend virgorously to enforce the merger guidelines. In the criminal law area, the Division's efforts to uncover and prosecute price fixing and bid rigging in government procurement merit increased support.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 3:

In addition to enforcement activities, are there any legislative initiatives that you intend to propose or pursue?

ANSWER:

There are currently at least three legislative matters I intend to pursue, if confirmed. As I indicated in my response to question one, the issues raised by legislation to alleviate concerns which deter the formation of lawful production joint ventures so as to impair the international competitiveness of U.S. industry, have a high priority. In addition, I support the Department's position regarding increased criminal penalties for corporations which violate the Sherman Act. I also favor modification of §8 of the Clayton Act to establish a *de minimis* standard for corporate interlocking directorates. I understand that you and Senator Metzenbaum have already introduced legislation addressing the criminal penalty and §8 issues.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 4:

Mr. Rill, in all likelihood during your tenure the Department of Justice will be required to file a report with Judge Greene as part of the three year review of the AT&T modified final judgment. At this time, do you have any opinion as to whether the restrictions on certain business activities which have been imposed pursuant to the modified final judgment should be lifted, or whether jurisdiction of this matter should be removed from the federal court to an administrative agency, such as the Federal Communications Commission?

ANSWER:

I have not been involved in the AT&T litigation. While I am familiar with the broad outlines of the decree, I need to know more regarding these provisions and their implementation. Enforcement of the decree would, of course, be a major responsibility of any head of the Antitrust Division. If confirmed, one of my first priorities will be to become fully informed as to all facets of current issues under the decree and exercise my responsibility for its administration.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 5:

Mr. Rill, over the last couple of years the various states and their state attorneys general have become very active in the antitrust area. They have promulgated their own merger guidelines, some states have enacted or have proposed legislation requiring companies to file Hart-Scott-Rodino pre-merger notification with the states, and recently the Supreme Court upheld indirect purchaser legislation promulgated by various states. Do you have any concern that this activity may result in a two track antitrust policy which will hamper our competitiveness at precisely the same time the European Community is consolidating its antitrust policy?

ANSWER:

Both the states and the federal government have an important antitrust role. For example, the states may very well be better suited to deal with horizontal conspiracies having primarily a local impact. Regarding mergers, however, I am concerned that state activity could, in some circumstances, lead to the application of inconsistent standards to the same merger. I understand that at least some state enforcement officials acknowledge that the federal government should have primary responsibility in the merger area. That primary responsibility should not impede the opportunity for cooperation with the states in any area, including mergers. I intend to cooperate with the states attorneys general to the end that antitrust enforcement can be as effective as possible, cognizant of the important role that both play in the antitrust field.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 6:

Finally, Mr. Rill, would you share with the Committee any thoughts you may have on the state of American competitiveness, and whether you believe that American business has been hampered by the antitrust laws in meeting international competition?

ANSWER:

I believe strongly in the important role antitrust must exert as a cornerstone of the American economy and as a force for public benefit. If confirmed, I will make every effort to support strong and efficient enforcement of the antitrust laws. The Department of Justice's antitrust enforcement currently takes international competitive considerations into account. For example, the 1984 Merger Guidelines weigh import competition in defining the relevant market and assessing entry.

It has been suggested that fear as to the scope of the antitrust laws may have deterred American business from entering into joint production activities that would enhance their ability to compete in global markets. Legislation is pending dealing with that issue and, although the Administration does not have a position on specific proposals, it is an area in which the Attorney General has expressed interest. Consideration of these proposals will have a high priority.

Senator METZENBAUM. And you have my proxy at the Republican conference. [Laughter.]

Senator THURMOND. I am sure it wouldn't be too welcome there. [Laughter.]

Mr. RILL. Thank you, Senator.

I only want to say very briefly, Mr. Chairman, that I am deeply honored that I have been appointed by President Bush to head the Antitrust Division. As Senator Hatch stated, my entire adult life has been spent in the practice of antitrust law—litigation, counseling, negotiation with the Government.

Over that time, I have developed a real deep respect for antitrust law as the cornerstone of the American economy and as a source of great public benefit. If I am confirmed, I certainly intend to exert every possible effort to see to it that a strong antitrust enforcement program is underway and that antitrust performs the role that is essential to its position in the American economy.

And, of course, I would be pleased to answer any questions that you have.

Senator METZENBAUM. I would just ask you if you would care to address yourself to the comments that I made at the opening about antitrust being part and parcel of a free enterprise system, free competition. Do you agree, disagree, or have any comments with respect to them?

Mr. RILL. I totally agree with that comment, Mr. Chairman. I think that antitrust is, as I said earlier, a cornerstone of the American economy. As one Supreme Court decision characterized it, it is the magna carta of our economic system.

I agree with you, in that I don't think that antitrust is a liberal or a conservative ethic. I think it is a broadly based national consensus, a total-spectrum aspect of our legal system, of our economic system, and I think it is one area where there is a true national support, a true national consensus for antitrust. And if confirmed, I intend to do the best that I can to foment and enhance that consensus.

Senator METZENBAUM. When President Reagan made his first appointment, William Baxter, from Stanford University, Mr. Baxter made it clear right from the outset that he challenged and disagreed with just about all of the major Supreme Court decisions which interpreted our antitrust laws.

Without expecting you to say I wholly support and believe in and vow to follow every single detail, do you have any general comments to make with respect to the Supreme Court's interpretation of the antitrust laws which we have on the books as of this present time?

Mr. RILL. Mr. Chairman, I think that with respect to any references to Assistant Attorney General Baxter and prior administrations, I have to say I would rather look forward, not backward.

Senator METZENBAUM. I understand that.

Mr. RILL. And I am not very good at critiquing other people's work, anyway. With respect to the trend of decisions in the U.S. Supreme Court, I certainly can't express fundamental disagreement with that trend. I think we have learned from some decisions such as the *General Dynamics* decision in 1974 involving merger law that considerations in addition to market structure considerations—other factors such as the condition of the industry ease of entry were critical in merger analysis. I think that was a sound decision.

I hope I don't leave anything out and permit the Justices to think that I am, by omission, criticizing any decisions, but I think the 1977 *Sylvania* decision, which reversed *Schwinn* and applied rule-of-reason analysis to nonprice vertical restraints, was a fundamentally sound decision.

I think that the reconfirmation implicit in *Monsanto* that resale price-fixing conspiracies are to be treated as per se unlawful expresses accurately the law of the land. I think the evidentiary concerns expressed in that case, and perhaps *Sharp* as well, at least are certainly attuned to some of the complexities that exist in distribution.

So, that may be a long way of saying, Senator, that—which I guess is a safe thing for a would-be Assistant Attorney General to say—that I concur certainly in the thrust of the Supreme Court antitrust decisions that have occurred in the last, certainly, two decades.

Senator **METZENBAUM**. As you know, we have some pending legislation which would affect some of those decisions, and that will be part of my inquiry with you today.

It will come as no surprise when I tell you that I disagreed with several enforcement decisions by the Reagan administration to approve mergers. In the Reagan administration, the word was out, the bars are down; anything, everything goes. There was no antitrust.

In the spring of 1987, I asked the Antitrust Division how many times the politically appointed chiefs overruled the recommendation of career staff attorneys to oppose a merger. The Division identified 10 such occasions during the Reagan administration up to that time.

In several of these cases, concentration was well in excess of those levels set out in the Department's own guidelines as, quote, "likely to be challenged," end of quote.

For instance, in the merger between Miniba Co. and New Hampshire Ball Bearings Co., concentration increased 585 points, as measured by the Department's index, to a postmerger level of 3,025. In the ADP-Bunker Ramo merger involving broker information services, the staff calculated an increase in concentration of 864, with a postmerger level of 5,128.

These mergers clearly violate the Department's own guidelines, falling in the "likely to be challenged range," with postmerger concentration in excess of 1,800, with a change of more than 100 points.

In each case, the Assistant Attorney General decided to ignore staff's recommendation and the mergers were permitted to go through.

I am frankly shocked that previous Division heads ignored their own guidelines, ignored their own staff's advice, and let the parties merge. When the Government refuses to follow its own rules, I suspect that few antitrust attorneys take those guidelines seriously anymore.

Do you intend to follow in the footsteps of the previous Division heads and ignore the guidelines and the recommendation of staff attorneys in merger cases?

Mr. RILL. Mr. Chairman, as I indicated earlier, I don't feel very comfortable critiquing a prior administration. I would much rather look forward. I wasn't involved in any way in either of the two merger transactions you referred to, so I don't have any particular knowledge of the facts of those transactions.

Senator METZENBAUM. I am really not asking that. I am really asking about whether you intend to ignore the guidelines and the recommendation of staff attorneys in merger cases.

Mr. RILL. Mr. Chairman, I think the guidelines are the logical, natural outflow of the Supreme Court decision in General Dynamics and subsequent decisions. I endorse the guidelines. I intend to follow the guidelines in all aspects of their analytical framework.

I certainly do not intend to ignore staff decisions. I think the guidelines set an excellent blueprint for merger enforcement. I intend to enforce the guidelines.

Senator METZENBAUM. From 1978 to 1980, the enforcement agencies reviewed an average of 925 mergers a year under the Hart-Scott-Rodino premerger notification program. The Department of Justice challenged an average of nine mergers a year during those years of the Carter administration.

During the Reagan administration, the agencies reviewed nearly twice as many mergers every single year, and yet the Justice Department averaged only six merger cases challenged per year.

Frankly, that is a pretty pitiful record, particularly in view of the fact 1988 may go down in history as the year of the megamerger. Mergers and Acquisitions Magazine reports that 1988 broke all records for the number of multi-billion-dollar deals and for the total amount of money spent on mergers.

The question that I have for you is very simple, very blunt. Do you expect to be more aggressive in challenging mergers than your predecessors?

Mr. RILL. Mr. Chairman, I cannot answer that question with respect to the actions of the predecessors because I don't know that a numbers game is—and I am not suggesting you are playing one—is something that can tell the total picture of merger enforcement.

I can only answer as I answered before that I respect the guidelines. I think the guidelines provide an excellent blueprint for merger enforcement. I intend to enforce the guidelines, and I certainly intend to rely with full respect on the staff's recommendations in connection with merger analysis.

Senator METZENBAUM. Now, I understand, and I think my understanding is correct, that you were active in getting the ABA to study the antitrust exemption for the insurance industry as contained in the McCarran-Ferguson Act.

As you know, the ABA recommended modifying the exemption. Frankly, I appreciate your efforts on this issue. I have some strong feelings that free competition means free competition for everybody, and the most powerful industry in America should not be exempt from the antitrust laws.

So I have pending legislation that would change that situation. I believe the insurance companies should abide by the laws of free competition. Would you care to address yourself at all to that subject and your own views?

Mr. RILL. Well, let me say this, Mr. Chairman. I think antitrust lawyers by and large generally tend to be somewhat skeptical about exemptions from the antitrust laws—by and large, as a matter of general principle.

As chairman of the antitrust section of the American Bar Association in 1988, I did represent the section's views, which favored a modified development of McCarran-Ferguson with some phase-in time and some safe harbors. That, I might say, was a very complex issue. I think, as your staff knows, it was very hotly contested even within the antitrust section itself, as well as within the entire ABA.

So far as I am aware, the Bush administration does not have a position on McCarran-Ferguson. I am sure there are concerns that far transcend pure antitrust concerns small business concerns, concerns of a phase-in problem for an industry that is for more than 40 years been operating under an exemption, concerns regarding State regulation that in some respects impinge on, but in some respects also transcend antitrust concerns.

I certainly think that all I can say at this point as a putative member of the Bush administration that I will be guided very strongly by whatever position the administration comes up with on that legislation.

Senator METZENBAUM. And if they ask you for your recommendation?

Mr. RILL. If they ask me for my recommendation, I will try to take into account the other factors that I mentioned and, in addition, take into account the prior positions that I have had in my mind and attempt to keep an open mind and formulate a recommendation to the administration on the issue.

Senator METZENBAUM. By inference, does that mean that your predisposition would be supportive of the fact that the antitrust laws ought to apply to the entire economy?

Mr. RILL. That is certainly a going-in position, Senator. I think, as I said, all antitrust lawyers tend to think antitrust should—and I am not an exception—should apply across the board.

What I am trying to express with respect to McCarran-Ferguson is that there is a need for an open mind here, and I think, Mr. Chairman, you yourself have had some modifications in your own drafts on this matter. There is a need for an open mind and there are aspects to it that I haven't examined as, say, chairman of the American Bar Association Antitrust Section that I would have to examine as a member of the administration, which compels me to say that I need to keep an open mind on State regulation, and so forth.

Senator METZENBAUM. I have said time and time again we don't want to hurt the insurance industry. We just want them to play by the rules that everybody else in the economy plays by, and we are willing to provide exceptions for certain of their activities that we don't consider to be anticompetitive.

And I have made that clear. I think I have actually made it clear in the legislation, and I would be very happy to work with you as the Assistant Attorney General for Antitrust, and the insurance industry, to see if we couldn't bring about an agreed-upon bill, because it is the concept, it is the thrust, it is the whole approach of exemptions from the antitrust laws, free competition, that bothers me and, I think, bothers many others as well. So I hope that we could work together promptly in that area.

Might I say, one of the worst beatings I took as a Senator was when I attempted to defeat an effort to provide an exemption for the bottling industry from the antitrust laws. They had a pretty good lobby going and they prevailed.

Then they came back, just as I predicted, and said, well, the beer industry will be back soon and other industries as well. The beer industry came back and we have so far been successful in keeping them from getting the exemption from the antitrust laws. Do you know of any reason why or do you have any opinion as to whether or not the beer industry or any other special industry in this country is entitled to an exemption from the antitrust laws?

Mr. Rill. Well, let me say upfront, Mr. Chairman, that this begins to impinge to some degree on a recusal policy. The fact of the matter is that I have made a private determination, with preliminary discussions with the ethics officers of the Department of Justice that, clearly in areas where I was substantially and directly involved on behalf of a client, that I should not participate as Assistant Attorney General if I am confirmed.

One of those areas is the one that you just mentioned, where you and I, I think, were on the same side, opposing the beer industry exclusive territory legislation, but I would have to say that that is an area in which as Assistant Attorney General, I will not be able to participate, because I represented the Food Marketing Institute on that measure.

The Department's position, of course, is a matter of record and I think it speaks for itself.

In answer to your more general question, I could only reiterate that I think, as a general matter, there are certainly exceptions, and in the areas where there is a need for government regulation, as a general matter, I think all antitrust lawyers have an abiding faith in antitrust and feel that, with an open mind and with flexibility, the general principle is it should apply across the economy, but only as a general matter.

Senator Metzenbaum. Thank you.

When you were in my office, I shared with you my concern about oligopolies. For instance, one bank cuts its prime rate or raises its prime rate half a point and, just like that, the entire Nation follows suit. When a steel company raises its prices $30 a ton, all of the steel companies in the country raise their price $30 a ton—no telephone calls necessary, nobody saying this is what we ought to do. Oil companies, one company goes up 10 cents a gallon, 20 cents a gallon, they all follow suit.

In my view, we need to do something about this. I am not quite certain what should be done. I am not suggesting a new private remedy, but possibly a governmental right to act, if there is a reason to do so. Have you given any further thought to that subject?

Mr. Rill. I have given some further thought to it, Senator. I know it is a matter of some complexity, it is a matter that has arisen from time to time in the past. I remember its having come up in the late 1950's in connection with some legislation that was being considered by one of your predecessors, as chairman of the subcommittee, Senator Kefauver.

I know that it is a matter as to which a number of economists, a number of legislators have raised question. It is also a matter that implicates intergovernmental relationships. Your bank example I think implicates the Fed, the Federal Reserve Board. The question of remedy, in the event there is legislation of this sort to be seriously considered, is extremely intricate.

As we discussed in your office, price identity can be in a particular context equally illuminative of competition as of noncompetition, and one needs to know a lot more about the industry.

Having said that, I think there are situations where various conspiratorial issues might arise in price increases, and where there are inferences of conspiracy, then I think that is something that the Division would probably want to take a look at now and would want to take a look at if I were confirmed.

Beyond the area of collusion, I think it is an area that requires a great deal of study, Senator. You have written me a letter on this and I intend to study it, because it is a matter of concern to you and a matter of concern that others have raised as well. I just want to, I am afraid, raise a flag, that we are dealing with very complex issues here and——

Senator METZENBAUM. It is what?

Mr. RILL. I'm sorry. We are dealing with very complex issues here and ones that implicate I think difficult questions of intergovernmental relations, economic policy and, at a more practical level, serious problems of proof. But I certainly will study it, Senator.

Senator METZENBAUM. I am aware that it might affect intergovernmental relations, I am aware that it might have issues of proof. I am not suggesting conspiracy. If you have a conspiracy, my guess is that present law is good enough to cover that. I am talking of where there is no conspiracy. I am talking about where one man makes a speech and says all of this and he implies that the appliance industry should be raising their prices "X" percent or something and, as a consequence, everybody gets the message and starts raising their prices.

I think that when that kind of development occurs, I think that the Attorney General, the Antitrust Division, and the President of the United States have a right to be concerned. I would not suggest that we put anybody in prison. I would not suggest that we mete out horrendous fines.

I would suggest that knowing that authority is there, knowing that the President or the Attorney General or the Assistant Attorney General in charge of Antitrust would have authority to go in and obtain injunctive relief very well could provide a factor in the decisionmaking process when everybody follows suit, such as the steel companies raising prices $30 a ton. And I would hope that—I am not looking to run with a piece of legislation this week or this month, but I expect to be here for quite a while and expect to be in this position, and I would hope that you would give it priority concern.

I am perfectly happy to provide for accommodations for discussions with the Federal Reserve Board, with whatever other agencies might have some impact. But when all is said and done, all I want to do is give the Government, not the Congress, give the Government the authority to act. I think it would be a major factor in stimulating competition or eliminating practices which are noncompetitive. And so I would just say to you that it is a matter that is strongly on my mind and I look forward to working with you on it.

Mr. RILL. Thank you, Senator.

Senator METZENBAUM. The per se rule against vertical price fixing has served us well in the 80 years since the Supreme Court's original decision in Dr. Miles. Consumers have benefited from shopping at discount outlets. Do you have any problems with codifying the per se rule?

Mr. RILL. I think it is clear that the law is that resale price fixing conspiracies are per se unlawful. I think that is the law of the land and I intend to enforce the law of the land.

As a matter of principle, I am not sure—if I am right about what the law is, I am not sure that codification is necessary. That is a policy judgment. My concern is that in the process of codifying a legal principle, it may be that—it is a difficult area of draftsmanship and one could fall into the trap of overcodifying, that is, bringing into the web of per se illegality a type of practice which the courts are treating today as not a price-fixing conspiracy, but some other type of vertical arrangement that would be treated under the rule of reason.

So, in that sense, yes, I do have some concerns with the notion of codification. I have no disagreement with your statement that the law of the land is that resale price-fixing conspiracies demonstrated to be such are per se unlawful.

Senator METZENBAUM. Now, I think you are familiar with S. 865, dealing with the Monsanto and Sharp decisions. What is your general reaction to the other provisions that are in that bill?

Mr. RILL. Let me say first, Senator, that I believe that the Justice Department has filed a statement with the House Judiciary Committee on a companion bill, which is somewhat different than this legislation. But the position of the Department, speaking for the administration in that latter, was in opposition to the House version of, let's say, the Monsanto-Sharp legislation.

I am generally familiar with the provisions of S. 865. I am familiar with some of the predecessor legislation. My reaction is that it is a very complicated, difficult area. The legislation itself has gone through a number of modifications in an attempt to address these complexities.

I am concerned, just speaking for myself and not in any way intending to express a different position than the one already expressed by the administration on the House bill, I am very concerned that by the way the legislation is drafted, particularly in its attempts to deal with the Sharp decision, but also in its attempt to deal with the Monsanto decision, that practice that I think everyone would agree should be treated under the rule of reason—for example, a manufacturer's simple attempt to establish an exclusive franchise arrangement, where they might have been dealing with a variety of dealers in the past—could under some interpretations of the draft bill be converted into a situation which would go to the jury as a per se price-fixing conspiracy question. And therefore I think that, yes, very candidly I am very troubled by the legislation in those respects, and obviously I am guided and directed by positions that have been taken this year by the Bush administration on this legislation, at least on the companion bill.

Senator METZENBAUM. Would you be willing to work with us to draft legislation in this area which, forgetting about the Monsanto and Sharp decisions, which would essentially do that which concerns this committee, and that is to protect the right of the consumer to be able to buy at a discount, and I think that is the thrust, the manner in which the manufacturer exercises its control is a part of that picture?

But I think that our concern starts at the end of the consumer. The court decisions have all dealt with the actions vis-a-vis the manufacturer and the merchant, and my question is: Would you be willing to work with us to attempt to structure a piece of legislation that would give the consumer the continued right to buy at a discount?

Mr. RILL. Mr. Chairman, of course, I will always consider any proposal that you as Chairman or the committee seeks to put forward and, consistent with positions that have been taken as administration positions, which are obviously ones to which I must defer and for which I have great respect, obviously I would be willing to consider anything that may come forward from the committee.

Senator METZENBAUM. Well, I do not want you to be locked into previous administration decisions, because, frankly, this administration is a very new one. It is only June, and it started in January. There was a carryover from the Reagan administration, and I would hope that, as the new head of this Department, you would not feel that that which was said in the first few months of this administration has established the policy for the entire Bush administration and that you would feel free to establish or to at least recommend to others in the administration your view as to what that policy ought to be.

Mr. RILL. I certainly would feel free to recommend within the administration my views as to antitrust policy.

Senator METZENBAUM. In previous years, I have introduced a bill to reverse the current ban on suits by indirect purchasers contained in Illinois Brick. The Supreme Court recently upheld this ban, but also found that State laws which permitted suits by indirect purchasers were not preempted. As a result, indirect purchasers can now sue under State laws. I am sure you know that better than the Chair.

I am currently considering introducing legislation that would permit Government indirect purchaser suits, while creating a pass on defense for defendants in certain instances. What is your impression, in general, of the need for reform of the Illinois Brick rule?

Mr. RILL. Well, it is a very current, very complex and I think very critical issue that involves private litigation under the Federal and State antitrust laws. It has been widely viewed by people who are expert in the field—and I appreciate but do not agree with your statement that I know more about this area than you do, because you have been in it for as long as I have, and in a more authoritative position.

But I think that we do have a new issue, a new complication, would be to understate it, in affecting private litigation in Federal and State courts. Observers, as I indicated, have suggested that defendants may well be exposed to not treble but sextuple damages in the interrelationship between Federal suits by direct purchasers and State suits by indirect purchasers.

The administration, so far as I know, does not have a position on any legislation dealing with the Illinois Brick-Arc America issues. I think it is something that deserves the attention of all aspects of the antitrust practice. I think it is very early on in the game. The full implications I do not think have been totally understood. There are a number of constituencies which need to be respected and heard from in this area, but I think it is an area that deserves the attention that you indicate you are giving it and it certainly will get reciprocal attention from me if I am confirmed as head of the Antitrust Division.

Senator METZENBAUM. The 1990 budget request for the Antitrust Division contains a reduction of another five staff positions. Since 1980, the number of staff attorneys in the Division has been reduced 60 percent. During that same time, merger filings have increased 300 percent. In addition, the Division has over 100 pending grand jury investigations.

I do not have to tell you that that is a dangerous trend. It is impossible to conclude that the shrinking number of staff makes no difference in the number or scope or enforcement activities by the Division. I do not know whether you are actually on the job—you are not on the job at all?

Mr. RILL. No, I am not on the job, Senator.

Senator METZENBAUM. Well, from the outside, do you feel that the antitrust enforcement is suffering from a lack of resources?

Mr. RILL. Senator, as you indicated, I am not on the job. I do not think I could answer that question intelligently or in any detail, without having some hands-on feel for what the Division's work powers are, what the budget constraints are, what the actual priorities that have been established, the on-going projects involve.

I think that is obviously a question that is going to be the priority of anyone that heads the Division, to make an assessment of whether the work power and budget resources are available for the Division to accomplish its mission.

To the extent that I may be confirmed, I certainly will give it top priority attention. If I feel that the resources are not adequate to perform the mission of the Division, I will certainly advocate that they be made available and do what I can within the structure of the budget process to support whatever is needed for the Division to do its job.

Senator METZENBAUM. I have introduced a bill with Senator Thurmond to shift the small fraction of the cost of merger review to the merging companies. S. 995 would require the acquiring company to pay a filing fee. The fee would be very small in comparison to huge fees paid to merger lawyers, bankers, and brokers. The money would be divided between the Division and the FTC. I hope that it would alleviate some strain on the agencies. Do you have any thoughts concerning filing fees?

Mr. **Rill**. Mr. Chairman, I really have not studied the overall question of filing fees. It has been an issue that goes into a variety of areas of Government involvement, from meat inspection to, as you propose, merger filings. I think that, without knowing more, I would not want to comment in any detail. I do not think the administration has a position on the issue, and I know whatever position—I think I know that whatever position that may come up with respect to HSR filing fees is going to be thoroughly reviewed by OMB, which I think does have a lot of concern with the issue and interest in the issue of filing fees. So, I really do not have a position on that at this point, Mr. Chairman.

Senator **Metzenbaum**. The administration is proposing some relaxation of antitrust laws to permit high-tech companies to cooperate in joint ventures for the production of various products, particularly high-definition television. My impression is that the law applying to joint ventures is very permissive.

For example, the Government approved the GM-Toyota joint venture, suggesting that perhaps no change is needed in the antitrust laws. However, two proposals have been suggested for promoting production joint ventures: Create an antitrust exemption for production joint ventures, or treat production ventures like research and development joint ventures, that is, apply the rule of reason and limit recovery to single damages for antitrust violations. Senators Leahy and Thurmond have a bill to that effect.

Do you believe there is a need for any change in the antitrust laws to accommodate production joint ventures?

Mr. **Rill**. Mr. Chairman, I think one of the great challenges facing us today, not only in the antitrust field, but across the economy, is the challenge of global competitiveness. I think that America is at a crossroads on the question of international competition, and I know that this is a matter of the highest priority across a number of areas of this administration.

So far as I know, actually, the administration does not have a firm formulated position on whether or not there is a need to relax or modify the antitrust laws with respect to joint ventures. Now, having said that, I am also aware that the Attorney General has expressed an intense interest in this area. He has expressed the concern that has been expressed by others, that at least those who would formulate and develop joint ventures for purposes of achieving production efficiencies may be deterred from doing so because of a fear of either Government prosecution or perhaps even more substantially private damage exposure.

To the extent that there is that fear that causes the deterrence of the formation and development of proefficiency production joint ventures, that is a matter of concern. It is a matter of concern from the standpoint of antitrust, and it is matter of concern from the standpoint of other interests in the economy.

As you indicated, Senator Thurmond and Senator Leahy have introduced legislation which, as I understand it, would extend the Cooperative Research and Development Act provisions to production joint ventures. Another possibility is extending the provisions of the Export Trading Company Act to production joint ventures.

These are proposals that require study. There are perhaps other options that would be available.

I think that the most I can say at this point is that it is a very important issue, the Attorney General has a very substantial interest in it, I have a very substantial interest in it. If confirmed, I will certainly give it very high priority for analysis.

Senator **Metzenbaum**. I want to say that, on the joint research legislation, which was my bill with Senator Thurmond, we spent I think better than a year negotiating the terms of that. Now, with the suggestion of joint development, then you get into the question of marketing and the whole picture. Then you also have in this situation the industry asking for $1.3 billion to subsidize the venture.

I would just say that this Chair has great difficulty in just how far we go with this joint production. I want to say this: I know of nothing that comes before the Congress that does not have a tag on it, we have got to do this by reason of foreign competition. I do not care whether it is agriculture policy, energy policy, defense policy, whatever, everybody comes in and gets their violin out and tells us, you have got to do this because there is foreign competition and otherwise they are going to come in and take over the whole entertainment industry or whatever industry may be the case. That is the latest one that we have got, and we will get into some questions on that.

So, I would just say to you that I am as concerned as anybody about foreign competition, but I think that if you are going to have any American dollars in it, then the American people should have a right to own a part of it, get part of the profits. If you are going to put up the money, you should share in the profits.

Having said that, let me just say that it is a subject that I think is on the agenda and I do not think we need to resolve it here this morning, but I would be happy to look at it and see what is fair and right.

Mr. **Rill**. Thank you, Senator.

Senator **Metzenbaum**. The 1984 Cable Act was predicated on the understanding, fanned by the cable industry itself, that cable was a potentially competitive industry and not a natural monopoly. Little did anyone realize the strength that this industry has now gained, to the point that it is actually squeezing some of the regular TV stations.

As a matter of fact, cable industry representatives stated that there would be two wires running down the street for the consumers. That is unadulterated blarney. And the FCC regards cable service as competitive as well, although their idea of competition is absurd. They say that if there are three TV stations in the area, that is competition. I do not know of a place in the country that does not get service from three TV stations, so I would say that the FCC should have laughed themselves out of the box on that one. It is just an absurd decision.

Now, Glen Mansion, a former attorney in the Antitrust Division, who works on cable issues, has written that:

> Since 1985, the Justice Department has declined to enforce antitrust laws in cable because it views cable as a natural monopoly. There is a Catch 22 here. Congress passed the Cable Act, based on the notion that competition in table would emerge. It has not. Meanwhile, FCC action has precluded rate regulation, and the Justice

Department has declined to apply antitrust laws here, because it regards cable as a natural monopoly. So, in recent years we have had no competition and apparently no antitrust oversight.

Does that situation concern you?

Mr. RILL. Obviously, any situation that would suggest that the antitrust laws are not effective is a matter that is of concern. This particular area is one in which I would need to do significantly more study. It is not an area in which I have had any particular expertise in practice. I recognize its importance, but it is not one where I have any either historic or a prior knowledge.

I am aware that, under the 1984 act, the FCC established certain standards of effective competition. I am also aware that the Antitrust Division of the Department of Justice suggested some other definitions of effective competition which the FCC did not adopt.

The relative wisdom of either one of those positions is not something that I have firsthand knowledge of. I can only say at this point I am aware that there is proposed legislation. If we are called on to evaluate the proposed legislation, that will be something to which I will give a high priority, but at this point I simply do not have the particularized expertise in the cable or broader area to make any, I think at this stage, terribly worthwhile contribution to the committee.

Senator METZENBAUM. The FCC is required by 1990 to review the viability of its effective competition definition and submit a report to Congress. Would you think that the Justice Department would be submitting comments to the FCC on that subject?

Mr. RILL. That is something I certainly want to discuss with the staff of the Division, if I am confirmed, to determine what prior practice has been, listen to the advice of the staff, and, consistent with departmental policy, give very serious consideration to filing with the FCC. Again, it is something on which I need to get more up to speed than I am now, and I certainly intend to do that.

Senator METZENBAUM. Changing the subject a little bit, when I learned of the Time-Warner merger, I wrote a little letter to the Justice Department outlining my concerns with respect to the merger. In particular, I stressed the relevant geographic market in the cable industry as local, since the consumers across the country have a choice of only one cable system. The Department found no trouble with the merger.

One month later, however, Viacom, a large vertically integrated cable company, filed an antitrust lawsuit against Time, Inc. and in its complaint, Viacom stated that the relevant geographic market for cable is local, and that each cable system is a monopolist in that local market. How would you define the cable market, and do you believe that cable is a monopoly at the local level?

Mr. RILL. I do not have an a priori position of whether or not cable is a monopoly at the local level. I simply would need to know more about the conditions in that particular industry, which, as I indicated, is not one where I have been particularly active in private practice.

I recognize that it is one that continues to attract the attention of the committee, it is one where I would tend to give it particular study. I can only say, as a general matter, the fact that there may be a monopoly of a particular technology does not necessarily mean, that is, that there may be a proprietary interest or a regulatory concession of a particular technology does not necessarily mean that there is a monopoly in the context of antitrust relevant markets.

Now, having said that, I do not mean to do anything other than to say this is an area which requires more study and a question, which you asked, to which I cannot give I think a totally intelligent direct answer at this point.

Senator **METZENBAUM**. Well, certainly, in cable we do not have any monopoly by reason of a particular technology. It is a monopoly because a community grants a franchise and then it is very difficult for the second company to come in, although in some instances they try, but other than that, there is no real competition. As a matter of fact, the monopoly aspects in this area come about by reason of the production companies refusing to sell their products except to certain cable companies, not permitting the wireless cable or the satellite dish operations to be able to compete effectively with them. So, they hold back their product, and if you do not have HBO or ESPN or whatever you cannot have a very effective service to the consumer, because the consumer wants some of those products I think it is an area that your Department should be looking at, because I think it is going to become more and more a hot issue.

As a matter of fact, yesterday, at a Senate Commerce Committee hearing on media concentration, a panel of three academic experts on the subject of media concentration were asked whether they would approve of the Time-Warner merger if they were in the Justice Department. Two of the experts flatly answered no, while the other, a professor at Columbia Business School, stated he would approve it only if some of the Time-Warner cable operations were divested.

I think all of this suggests that your Department has to do a more vigorous analysis of mergers in the media and entertainment industry and, as you well know, at the present time we now have Time-Warner sort of up in the air, because Paramount has moved in on the Time deal.

Let me change the subject a little bit. Between 1977 and 1980, the Justice Department entered into consent decrees with the three television networks that essentially incorporated the FCC's financial interests in syndication rules. One provision of these rules prevents the networks from owning a financial interest in programs they purchase from production studios for exhibition on network television. This provision is designed to insure that networks do not make primetime programming decisions based on a studio's willingness or unwillingness to give them a financial interest in a television show it has produced.

Another provision of these rules restricts the network's right to sell TV programs in the broadcast syndication market once those shows have completed their runs in primetime. This provision is designed to protect independent TV stations by insuring their access to popular shows. These rules are credited with promoting diversity in program production and stimulating the growth of independent television stations. Do you believe the rules have served the public interest, and do you believe the rules should be retained, absent a showing that the networks are no longer capable of misusing their market power over primetime programming?

Mr. Rill. Again, I regret I do not have a conclusive or even a priori answer to that question. I know it is an issue that has come up from time to time. It is my understanding that the networks have expressed the concern—and this is really a second-hand understanding—that the limitations by the decree and the FCC rules put them in an adverse competitive position, in a situation where their market circumstances are not the same as they were at the time that the decree was entered at the time the FCC rules were adopted, which actually antedated the decree.

I think it is a dynamic market. I think it is one in which static analysis is probably not a good thing. I think that any kind of analysis that would arise under the rule of the decree would have to take into account changed conditions within the industry, and one needs to be more familiar with those conditions to be able to answer your question.

Senator Metzenbaum. The Chicago School basically believes that predatory pricing could not exist, that it was irrational for a company with a high-market share to lower prices in order to drive competitors out of the market. I disagree, because I have seen it in the real world, not at the University of Chicago. Big companies are willing to lower prices in the short term and force certain smaller competitors out of business. When they do, prices go up. Do you have any thoughts with regards to predatory pricing?

Mr. Rill. I disagree with the Chicago School, if that is indeed the Chicago School's position, that predatory pricing cannot exist. I think there are market configurations where entry is impeded or barred, more properly, where a company is particularly dominant in the market, where it could price below variable costs in the hope of driving out competition and, because of entry barriers, would have an opportunity to recoup its losses, under those circumstances I think predatory pricing could be a very viable, logical competitive rationale.

So, no, I do not think predatory pricing never exists. I think that the standards that have evolved from the Harvard School, if you will, of Orina and Turner, that have been adopted in a greater or lesser degree by a number of court decisions, set out some in-general reasonable ground rules. But I think the law is that predatory pricing under certain circumstances is a violation of section 2 of the Sherman Act, and to the extent that anybody disagrees with that, I think they are simply not attuned to what the state of the law is.

Senator Metzenbaum. Let me go back to the per se rule matter for a moment, as the per se rule for resale price maintenance. Do you anticipate advocating to the Supreme Court that the per se rule should be overturned?

Mr. Rill. No, I do not.

Senator Metzenbaum. I think that we may have some questions on other topics. I think other members of the Committee may have questions on other topics. I appreciate you cooperating with us this morning and I look forward to working with you.

I do not have much doubt in my mind that you will be confirmed, and I think you ought to start getting your house in order to leave private practice.

Mr. **Rill**. Thanks very much, Mr. Chairman. I appreciate your courtesy and your time. Thank you.

Senator **Metzenbaum**. The committee stands adjourned.

[Whereupon, at 10:50 a.m., the Committee was adjourned.]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

June 19, 1989

Honorable Joseph R. Biden
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the responses of James F. Rill to the written questions of Senators Metzenbaum, Thurmond, Hatch and Simon in connection with his nomination as Assistant Attorney General, Antitrust Division.

If we can be of any further assistance, please let us know.

Sincerely,

Carol T. Crawford
Assistant Attorney General

Enclosure

cc: Honorable Strom Thurmond
Honorable Howard Metzenbaum

QUESTIONS FROM SENATOR HOWARD M. METZENBAUM, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 1:

In your opinion, is there any theory of injury that a competitor could allege to survive a motion to dismiss in a suit to enjoin a merger between two of its competitors?

Follow-up: Do you think it is likely that the Supreme Court will review this principle again given that there have been different interpretations of Cargill by the circuits? For example, the Second Circuit permitted a suit by Bigelow Tea Because the company alleged that the combination of Lipton and Celestial Seasonings would create a firm with over 84 percent market share.

ANSWER:

There is no categorical rule barring competitor standing in merger litigation, nor should there be such a rule. Various circumstances are relevant, such as merger to monopoly, market dominance coupled with entry barriers, certainly with evidence of predatory conduct. I do not read Cargill as suggesting a bar to competitor standing; in fact, the Court expressly rejected absolute preclusion. Bigelow does disagree with some of the rationale of Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95 (5th Cir. 1988). Whether the Supreme Court would review any case depends on the Court's perception of the character and importance of case before it, together with a number of other factors.

QUESTIONS FROM SENATOR HOWARD M. METZENBAUM, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 2:

The 1956 consent decree between the Government and IBM put an end to IBM's lease-only policy. The purpose of the consent decree was to create competition for new IBM equipment by requiring IBM to sell its machines. And that is precisely what happened. Dozens of computer dealers now sell or lease used IBM equipment in competition with IBM.

However, in 1986, IBM instituted a new policy to restrict modification of used IBM equipment. IBM now prohibits computer dealers from modifying the microcode on used machines to suit a particular customer's needs. Instead, the dealer must bring the microcode to IBM for reprogramming and pay a licensing fee. This policy puts used equipment dealers at a disadvantage in competing with IBM because IBM can simply go out and try to sell that customer a new machine before it finishes modifying the microcode.

If the Division were to conclude that this policy contradicted the intent of the consent decree to create competition for IBM, would the Division take steps to enfoce the decree?

ANSWER:

I am not sufficiently familiar with the factual statements set forth in the question or the background of the 1956 IBM decree to formulate any opinon as to whether the conduct described would violate the decree. I can say that should the Division conclude after investigation that any conduct is in violation of a United States antitrust decree, it would take action to enforce that decree.

QUESTIONS FROM SENATOR HOWARD M. METZENBAUM, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 3 & 4:

The antitrust lawsuit which broke up AT&T was one of the largest antitrust enforcement actions ever brought by the Department of Justice. The Department is repsonsible for enforcing the provisions of the consent decree which restrict the Regional Bell Operating Companies -- also known as the Baby Bells -- from entering certain lines of business: long distance, equipment manufacturing and information services. In each of those three businesses, access to the Baby Bells' local phone network is essential to compete effectively. The line of business restrictions are designed to prevent the Baby Bells from using their monopoly control over the local phone network to unfairly compete in those three adjacent markets.

Do you agree with the antitrust principles underlying the decree, which hold that a regulated monopoly violates the law if it leverages that monopoly to stifle competition in an adjacent, unregulated market? Do you agree that a monopolist has special duties if it controls an essential or "bottleneck" facility to which competitors require access on fair and non-discriminatory terms?

ANSWER:

I have not been involved in the AT&T litigation and am, therefore, not at this time fully informed as to the record leading up to the decree. I am familiar with the broad outlines of the decree and agree with the antitrust principle that a regulated monopoly can leverage its position in the regulated market to adversely affect competition in an adjacent market. In addition, there are circumstances under which a monopolist may have special duties to deal on a nondiscriminatory basis with competitors where the monopolist occupies a bottleneck position. It is my understanding, in this regard, that the decree prohibits anticompetitive discrimination by the Regional Bell

Operating Companies. I have no current basis for concluding that the facts as they now exist are in all respects identical to those implicit in your question, but intend, as a highest priority if confirmed, to become fully familiar with all aspects of the AT&T decree and its administration.

QUESTIONS FROM SENATOR HOWARD M. METZENBAUM, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 5:

In 1984, the Department supported the line of business restrictions contained in the decree. In 1987, at the first triennial review of the decree, the Department did a complete flip-flop and advocated lifting the equipment and information services restrictions. The Department made this recommendation even though its own studies showed that the Baby Bells' monopoly control over the local phone network -- the antitrust predicate for the decree -- was as strong as ever.

The next triennial review of the decree will be in 1990. Do you feel bound by the position taken by the Department in 1987?

Follow-up: Do you feel it is appropriate for the Department to oppose the decree's restrictions if the antitrust predicate for the decree is the same now as it was in 1984, when the Department supported the decree?

ANSWER:

District Court's decision on the Department's 1987 recommendations is currently under review by the U.S. Court of Appeals for the D.C. Circuit. After the appeal process is completed, I understand that the Department will evaluate the then-relevant competitive and technical conditions and will make further recommendations. The Court of Appeals decision and these other relevant factors will guide my recommendations. Without being familiar in detail with the operation of the decree in the factual context of the industry, I cannot personally, at this time, assess the extent and impact of the changes that have occurred since 1984. As stated in my answer to Questions 3 and 4, one of my first priorities will be to become fully informed as to all facets of current issues under the decree and exercise responsibility for its administration.

QUESTIONS FROM SENATOR HOWARD M. METZENBAUM, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTIONS 6:

Attorney General Thornburgh has completely disqualified himself from any involvement in the AT&T decree. During your law practice, were you or your law firm involved in any matter which would require you to recuse yourself from involvement in representing the Department in this area?

ANSWER:

A draft letter regarding my recusal policy has been submitted to the Committee, together with a clarifying letter from Janis Sposato, General Counsel, Justice Management Division, Department of Justice. As indicated in those materials, I intend to follow the guidelines for disqualification promulgated by the Administrative Conference of the United States.

As I understand those guidelines, I would not be required to recuse myself from involvement in representing the Department with respect to the AT&T decree. This understanding has been confirmed for me by the Department's ethics counselor in the Antitrust Division.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 1:

Mr. Rill, as you may know, Senator Leahy and I have recently introduced a bill amending the National Cooperative Research Act of 1984 to include manufacturing. Among other things, the purpose of this legislation is to promote American competitiveness and technological innovation. I would appreciate hearing your views on the effectiveness of the 1984 Act, and the need for extending it to include production activities. In addition, would you comment on whether you have any preference for the procedure to be used, that is, would you prefer the more extensive certification process as proposed in the Boucher/Campbell bill, or the notification procedure we have proposed, which is currently employed in the 1984 Act?

ANSWER:

One of the most imposing challenges facing America business is establishing and maintaining a competitive edge in global markets. It has been suggested that cooperative production joint ventures among U.S. manufacturers might in fact improve U.S. efficiency and ability to compete worldwide. It has also been suggested that manufacturers' fear of antitrust liability deters the formation of these production joint ventures. Although the Administration does not as yet have a position on this issue, the Attorney General has indicated interest in exploring antitrust legislation that will alleviate the concerns which may be deterring the formation of legitimate joint production ventures. At least two approaches have been advanced. One, as introduced by you and Senator Leahy, is modeled after the Research and Development Cooperation Act, and would provide for rule-of-reason treatment for production joint ventures of which the government is notified and immunize them against treble damages. I understand that the Research and Development Cooperation Act has been effective;

more than 125 notifications covering a wide range of research and development activities have been filed since the Act went into effect. Another possibility, as proposed in the bill sponsored by Representatives Boucher and Campbell, is patterned after the Export Trading Company Act. It would bar all antitrust damage suits against joint ventures certified by the Government.

While the Administration has not taken a position on any particular bill, the issues addressed by this legislation would be among my highest priorities.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 2:

Mr. Rill, would you identify any key area, or areas, that you intend to emphasize during your tenure as Assistant Attorney General?

ANSWER:

In my antitrust practice, I have been substantially involved in litigation on behalf of plaintiffs as well as defendants. I have increasingly appreciated the importance of case-by-case litigation to the direction of antitrust law. Therefore, if confirmed, my first goal will be to promote the most effective, efficient law enforcement program possible, in both the criminal and civil fields. For example, I intend virgorously to enforce the merger guidelines. In the criminal law area, the Division's efforts to uncover and prosecute price fixing and bid rigging in government procurement merit increased support.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 3:

In addition to enforcement activities, are there any legislative initiatives that you intend to propose or pursue?

ANSWER:

There are currently at least three legislative matters I intend to pursue, if confirmed. As I indicated in my response to question one, the issues raised by legislation to alleviate concerns which deter the formation of lawful production joint ventures so as to impair the international competitiveness of U.S. industry, have a high priority. In addition, I support the Department's position regarding increased criminal penalties for corporations which violate the Sherman Act. I also favor modification of §8 of the Clayton Act to establish a *de minimis* standard for corporate interlocking directorates. I understand that you and Senator Metzenbaum have already introduced legislation addressing the criminal penalty and §8 issues.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 4:

Mr. Rill, in all likelihood during your tenure the Department of Justice will be required to file a report with Judge Greene as part of the three year review of the AT&T modified final judgment. At this time, do you have any opinion as to whether the restrictions on certain business activities which have been imposed pursuant to the modified final judgment should be lifted, or whether jurisdiction of this matter should be removed from the federal court to an administrative agency, such as the Federal Communications Commission?

ANSWER:

I have not been involved in the AT&T litigation. While I am familiar with the broad outlines of the decree, I need to know more regarding these provisions and their implementation. Enforcement of the decree would, of course, be a major responsibility of any head of the Antitrust Division. If confirmed, one of my first priorities will be to become fully informed as to all facets of current issues under the decree and exercise my responsibility for its administration.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 5:

Mr. Rill, over the last couple of years the various states and their state attorneys general have become very active in the antitrust area. They have promulgated their own merger guidelines, some states have enacted or have proposed legislation requiring companies to file Hart-Scott-Rodino pre-merger notification with the states, and recently the Supreme Court upheld indirect purchaser legislation promulgated by various states. Do you have any concern that this activity may result in a two track antitrust policy which will hamper our competitiveness at precisely the same time the European Community is consolidating its antitrust policy?

ANSWER:

Both the states and the federal government have an important antitrust role. For example, the states may very well be better suited to deal with horizontal conspiracies having primarily a local impact. Regarding mergers, however, I am concerned that state activity could, in some circumstances, lead to the application of inconsistent standards to the same merger. I understand that at least some state enforcement officials acknowledge that the federal government should have primary responsibility in the merger area. That primary responsibility should not impede the opportunity for cooperation with the states in any area, including mergers. I intend to cooperate with the states attorneys general to the end that antitrust enforcement can be as effective as possible, cognizant of the important role that both play in the antitrust field.

QUESTIONS FROM SENATOR STROM THURMOND, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 6:

Finally, Mr. Rill, would you share with the Committee any thoughts you may have on the state of American competitiveness, and whether you believe that American business has been hampered by the antitrust laws in meeting international competition?

ANSWER:

I believe strongly in the important role antitrust must exert as a cornerstone of the American economy and as a force for public benefit. If confirmed, I will make every effort to support strong and efficient enforcement of the antitrust laws. The Department of Justice's antitrust enforcement currently takes international competitive considerations into account. For example, the 1984 Merger Guidelines weigh import competition in defining the relevant market and assessing entry.

It has been suggested that fear as to the scope of the antitrust laws may have deterred American business from entering into joint production activities that would enhance their ability to compete in global markets. Legislation is pending dealing with that issue and, although the Administration does not have a position on specific proposals, it is an area in which the Attorney General has expressed interest. Consideration of these proposals will have a high priority.

QUESTION OF SENATOR ORRIN G. HATCH, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

Mr. Rill, in 1983, I supported an effort to keep in place the Financial Interest and Syndication Rule. That rule prevents the major television networks from using their market power to extract a financial interest in the shows that they choose to broadcast over-the-air. The networks are currently operating under consent decrees based on the rule.

In my view, the consent decrees have helped to nourish competition. When the decrees were adopted, there were just over 70 independent TV stations in the country, and now there are over 300. There are also a greater number of independent program producers.

Recently, I have been contacted with respect to the modification of these consent decrees. Are you aware of any questions that have been raised with respect to these decrees?

How would you go about considering a request to reopen these decrees?

I would hope that you would consult with this Committee if the Department were to begin a reconsideration of this issue.

ANSWER:

I am not aware of any pending questions that have been raised with respect to the consent decrees relating to the financial interests networks may have in shows that they choose to broadcast.

In the event any parties request modification of these or other decrees, my understanding is that the Department of Justice conducts such investigation as is appropriate in the circumstances. If it concludes that modification of the decree is appropriate, the Department will file a statement with the court tentatively in support of a motion by the defendant for modiciation of the decree. Notice of the proposed modification will be published in the Federal Register, and trade publications, and interested persons will have an opportunity to comment. The Department will assess the comments, modify its position if appropriate and reply to the comments. The court having jurisdiction over the decree will then rule on the motion for modification.

If any member of Congress has information or concerns regarding these decrees, I would very much welcome receiving them and would give them careful consideration.

QUESTIONS FROM SENATOR PAUL SIMON, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 1:

There have been a number of recent airline mergers and as a result there are now eight major U.S. airlines. How do you think these mergers and the use of the hub-and-spoke system affect consumers?

ANSWER:

As an officer of the ABA Antitrust Section, I supported legislation to transfer the responsibility for review of airline mergers from the Department of Transportation to the Department of Justice. Prior to this transfer, the Antitrust Division had opposed certain airline mergers in filings before the Department of Transportation. Since the transfer, the Department of Justice has announced it would challenge U.S. Air's acquisition of certain Eastern Airline properties in Philadelphia, based in part on the loss of a potential hub competitor. I am aware that there are efficiencies associated with the hub-and-spoke system; however, hubs can creat barriers to entry or expansion by firms and are, thus, relevant to an analysis of mergers in the airline industry. The merger guidelines should be fully applicable to airline mergers, and when any such merger would violate the guidelines, it should be challenged. I am not involved in any airline merger and at the present time, I do not have sufficient facts to make an informed assessment as to whether any particular future airline merger would violate the Clayton Act.

QUESTIONS FROM SENATOR PAUL SIMON, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 2:

Do you think the current computer reservation system provides for fair competition between airlines?

ANSWER:

Since I am not at present involved in any matters relating to the airline industry, I cannot make a detailed, fact-based assessment of the airline computer reservation systems as they currently operate. Moreover, I am aware that the Department is investigating a matter involving these systems and I am not in a position to comment on this pending investigation.

QUESTIONS FROM SENATOR PAUL SIMON, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 3:

What are your views on the appropriate treatment of hospital mergers under the antitrust laws?

ANSWER:

Hospital mergers, including those involving not-for-profit hospitals, are subject to the antitrust laws and are evaluated under the merger guidelines. The guidelines do take account of the benefits that can be achieved by mergers, but protection of competition remains important in the health care field.

QUESTIONS FROM SENATOR PAUL SIMON, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 4:

What is your position on whether the Bell Operating Companies should be able to get into the business of providing electronic information services, long-distance phone service and manufacture of phone equipment?

ANSWER:

I have not been involved in the AT&T litigation. While I am familiar with the broad outlines of the decree, I need to know more regarding these provisions and their implementation. Enforcement of the decree would, of course, be a major responsibility of any head of the Antitrust Division. If confirmed, one of my first priorities will be to become fully informed as to all facets of current issues under the decree and exercise my responsibility for its administration.

QUESTIONS FROM SENATOR PAUL SIMON, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 5:

Like Senator Metzenbaum, I too am a strong supporter of the Consumer Against Price Fixing Act. I would very much like to see this measure enacted this year, and I was happy to see you are willing to work with us on this legislation. Are there any changes that you would recommend that would make the bill acceptable to the Department?

ANSWER:

The law is clear that vertical price-fixing conspiracies are per se illegal. If confirmed, I intend to enforce the law. The law is also clear, since GTE Sylvania, that nonprice vertical arrangements initiated by a manufacturer are to be treated under the rule of reason. The recent statement of the Department of Justice to the House Judiciary Committee on companion legislation expresses Administration policy.

The principal concern with the present bill is that it could lead to judicial interpretations that would apply per se standards to nonprice vertical arrangements, such as a manufacturer's establishment of an exclusive franchise, thus contradicting the holding in GTE Sylvania. Conduct, which does not constitute an agreement on resale pricing should not be subjected to per se treatment by legislation. Thus, I would be concerned with any legislation that would undercut the GTE Sylvania holding or do violence to the principles announced in the Colgate decision.. I would be happy to discuss any legislative proposals with the Committee.

QUESTIONS FROM SENATOR PAUL SIMON, COMMITTEE ON THE JUDICIARY, FOR JAMES F. RILL TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION:

QUESTION 6:

What do you think of the Vertical Restraints Guidelines?

ANSWER:

The substance of the Vertical Restraints Guidelines itself sets forth relevant criteria to be taken into account in assessing the legality of such restraints under the antitrust laws. In addition, caselaw which has developed since the guidelines were issued identify appropriate criteria. The courts have not cited the Vertical Restraint Guidelines with the same frequency as they have the Merger Guidelines. In any evaluation of a particular vertical restraint, the guidelines and caselaw would be weighed in arriving at an enforcement determination.

JAMES F. RILL

Birth:	March 3, 1933	Evanston, Illinois
Legal Residence:	Maryland	
Marital Status:	Married	Mary Elizabeth Laws Rill 2 children
Education:	1950 - 1954	Dartmouth College B.A. degree
	1956 - 1959	Harvard Law School LL.B. degree
Bar:	1959	District of Columbia
Military Service:	1954 - 1956	United States Army
Experience:	1959 - present	Collier, Shannon, Rill & Scott Associate (1959-1964) Partner (1964-present)
	1987 - 1988	American Bar Association Chair, Antitrust Section
Office:	1055 Thomas Jefferson Street, NW Washington, D.C. 20007 202 342-8430	
Home:	7305 Masters Drive Potomac, Maryland 20854	

To be an Assistant Attorney General

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR NONJUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

James Franklin Rill

2. Address: List current place of residence and office address(es).

Home: 7305 Masters Drive
Potomac, MD 20854

The Little Fortress
Round Hill, VA

Office: 1055 Thomas Jefferson Street, NW
Washington, DC 20007

3. Date and place of birth.

March 4, 1933
Evanston, IL

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married
Mary Elizabeth Laws Rill
Homemaker

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Harvard Law School
9/56-6/59
LL.B.

Dartmouth College
9/50-6/54
A.B.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1959 to Present
Collier, Shannon, Rill & Scott
Washington, DC
Associate (1959-1963)
Partner (1964 to Present)

1973 to Present
Marshall Durbin Food Corporation
Birmingham, AL
Director

1987 to 1988
The Winston Group, Inc.
Lanham, MD
Director

1970 to Present
Bureau of National Affairs
Washington, DC
Member of Advisory Board of Antitrust & Trade Regulation Report

1978 to Present
The Bullis School
Potomac, MD
Board of Trustees

6/58-9/58
Covington & Burling
Washington, DC
Courier, Librarian, Law Clerk
Part time while in school

6/57-9/57
Covington & Burling
Washington, DC
Same

6/56-9/56
Covington & Burling
Washington, DC
Same

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

7/54-4/56
U.S. Army (Artillery)
2nd and 1st Lieutenant
04038062
Honorable Discharge

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Trustee, The Bullis School
Potomac, MD

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association, Section of Antitrust Law
    Founder and Member, The ABA Section of Antitrust Law Special Committee to Study the Role of the FTC (1988-1989)
    Immediate Past Chair, Section of Antitrust Law (1988-Present)
    Chair, Section of Antitrust Law (1987-1988)
    Chair-Elect (1986-1987)
    Finance Officer (1984-1986)
    Council Member (1981-1984)
    Chair, Robinson-Patman Committee (1978-1981)
    Chair, Committee on Legislation (1970-1973)

Member, Bar Association of the District of Columbia

Member, American Judicature Society

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

(None active in lobbying before public bodies):

Potomac Appalachian Trail Club

Metropolitan Club
Washington, DC

Loudon Golf & Country Club
Purcellville, VA

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Member of the Bar, District of Columbia and U.S. Court of Appeals, District of Columbia Circuit (1959)
Member of the Bar, U.S. Supreme Court (1965)
Member of the Bar, U.S. Court of Appeals, 7th Circuit (1970)
Member of the Bar, U.S. Court of Appeals, 5th Circuit (1981)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

See Attachment I

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent; 9/28/87 (Date of last physical)

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None

15. Legal Career:

    a. Describe chronologically your law practice and experience after graduation from law school including:

        1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

        2. whether you practiced alone, and if so, the addresses and dates;

        3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

See Attachment II

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) The indivgidual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

See Attachment III

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

See Attachment IV

ATTACHMENT I

I. BIOGRAPHICAL INFORMATION (PUBLIC)

12. Published Writings:*

"The Antitrust Bar Reacts to Supreme Court Decision (Business Electronics v. Sharp Electronics Corp.)," J. Rill, 2 Antitrust 36 (1988)

"Antitrust: Where We Stand Today" (ABA Antitrust Law Section 36th Annual Spring Meeting, Washington, D.C., Mar. 23-24, 1988), Rill, 57 Antitrust L. J. 3 (1988)

"60 Minutes With Charles F. Rule, Assistant Attorney General, Antitrust Division" (ABA Antitrust Law Section 36th Annual Spring Meeting, Washington, D.C., Mar. 23-24, 1988), Rill, 57 Antitrust L. J. 257 (1988)

"FTC Faces Winter of Discontent: 'Whipping Boy' of Congress," J. Rill, 10 Legal Times 23 (1987)

"Discussion of Joint Venture Hypothetical B" (National Inst. on Joint Ventures, New York, N.Y., Nov. 14-15, 1985) (Panel Discussion), Rill, 54 Antitrust L. J. 1197 (1985)

"60 Minutes With James C. Miller, III, Chairman, Federal Trade Commission (Thirty-Third Annual Spring Meeting, ABA Section of Antitrust Law, Washington, D.C., Mar. 20-22, 1985), Rill, 54 Antitrust L. J. 155 (1985)

"Availability and Functional Discounts Justifying Discriminatory Pricing (Living With the Robinson-Patman Act)," Rill, 53 Antitrust L. J. 929 (1984)

"Panel Discussion - Questions and Answers (Living With the Robinson-Patman Act)," Rill, 53 Antitrust L. J. 967 (1984)

"Will Unfair Competition Methods Be Next FTC Target?", J. Rill, 6 Legal Times 29 (1983)

"Non-price Vertical Restraints Since Sylvania: Market Conditions and Dual Distribution" (31st Annual Spring Meeting, Washington, D.C., Mar. 23-25, 1983), Rill, 52 Antitrust L. J. 95 (1983)

"Vertical Restraints After GTE Sylvania: Current Confusions" (31st Annual Spring Meeting, Washington, D.C., Mar. 23-25, 1983) (Panel Discussion), Rill, 52 Antitrust L. J. 137 (1983)

"FTC Ad Proposals Would Restore Public Confidence," J. Rill, 5 Legal Times 32 (1982)

"Legislative Issues and Judicial Developments" (Panel Discussion), Rill, 51 Antitrust L. J. 679 (1982)

"Dramatization: Pricing and Promotional Discounts" (Proceedings of National Inst. on Antitrust Counseling and the Marketing Process, Chicago, IL, June 12-13, 1980), Rill, 49 Antitrust L. J. 497 (1981)

"Recent Developments Affecting Private Actions Under the Robinson-Patman Act," J. Rill; "Panel Discussion on Prosecuting and Defending Claims Under the Robinson-Patman Act" (LaRue, Klingsberg, Stoer & Rill), 47 Antitrust L. J. 1393-430 (1979)

"Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act," Rill & Frank, 30 Vand. L. Rev. 131 (1977)

"New West Virginia Antitrust Act From the Defense Perspective," Rill, 81 W. Va. L. Rev. 207 (1979)

"Developments in Federal Antitrust Legislation," Rill, 41 Antitrust L. J. 297 (1971-1972)

"The Single Product as a Relevant Market in Attempt to Monopolize Cases," Rill & Ranson, 26 Mercer L. Rev. 389-616, 651-974 (1975)

"Antitrust Report From Official Washington: A Symposium - Consumer Protection Legislation - 1970: A Panel" (Rill, Moss, Cook, Carey, Barton & Holmes), 39 Antitrust L. J. 367 (1969-1970)

"Developments in Federal Antitrust Legislation," Rill, 40 Antitrust L. J. 729 (1969-1970)

"Report From Official Washington, Report From Capitol Hill: A Panel" (Rill, Toye, O'Leary, Scott, Cohen & Pertschuk), 41 Antitrust L. J. 356 (1971-1972)

"Consumer Protection Legislation - 1970: A Panel" (Rill, Moss, Cook, Carey, Barton, Holmes & Rowe), 39 Antitrust L. J. 385 (1969-1970)

"Federal Consumer Legislation," Millstein, Pitofsky, Austern, Rill & Bakke, 28 Bus. L. 289 (1973)

"Report From Official Washington, Report From Capitol Hill: A Panel" (Rill, Toye, O'Leary, Scott, Cohen, Pertschuk), 41 Antitrust L. J. 356 (1971-1972)

"Symposium: Antitrust Report From Official Washington: Behind the Scenes With Congressional Committees: A Panel" (Rockefeller, Toye, Rill, Chumbris, Cohen, Harkins, Potvin), 38 Antitrust L. J. 183 (1968-1969)

"Recent Robinson-Patman Developments: The Bounds of the Act: A Symposium - Robinson-Patman Developments: The Approach of Business Counsel," J. Rill, 14 Antitrust Bull. 785 (1969)

"Conglomerate Mergers: The Problem of 'Superconcentration'," Rill, 14 UCLA L. Rev. 1028 (1967)

"Trend Toward Social Competition Under Section 7 of the Clayton Act," Rill, 54 Geo. L. J. 891 (1966)

"Robinson-Patman Act: A Symposium - Brokerage Under the Robinson-Patman Act: Toward a New Certainty," Rill, 41 Notre Dame L. Rev. 331 (1966)

"Discovery Under Title VII of the Civil Rights Act of 1964 - New Concept Agency and Challenge," Rill & Scott, 18 Ad. Law Rev. 75 (1966)

"Federal Trade Commission Enforcement," J. Rill, 607 29th Annual Antitrust L. Inst. 403 (Practising Law Institute 1988)

"Dealer Termination," J. Rill, 589 Distribution and Marketing 755 (Practising L. Inst. 1988)

"Relations With Suppliers, Customers, and Franchisees," J. Rill, 560 28th Annual Antitrust L. Inst. 241 (Practising L. Inst. 1987)

"Discriminatory Prices, Promotions, and Brokerage," J. Rill, 546 26th Annual Advanced Antitrust Seminar: Distribution and Marketing 283 (Practising L. Inst. 1986)

"The Robinson-Patman Act: Discriminatory Prices, Competitive Injury, and Defenses," J. Rill, 524 27th Annual Antitrust L. Inst. 185 (Practising L. Inst. 1986)

"The Robinson-Patman Act: Discriminatory Prices, Competitive Injury, and Defenses," J. Rill, 511 Distribution and Marketing; The New Antitrust Environment 145 (Practising L. Inst. 1986)

"The Robinson-Patman Act: Discriminatory Prices, Competitive Injury, and Defenses," J. Rill, 427 Marketing Institute 375 (Practising L. Inst. 1983)

"Key Unresolved Issues Involving Collateral Offenses and Buyer Liability Under the Robinson-Patman Act," J. Rill, 311 20th Annual Antitrust L. Inst. 459 (Practising L. Inst. 1979)

"Trends Affecting Private Actions Under the Robinson-Patman Act," J. Rill, 325 19th Annual Advanced Antitrust Seminar 325 (Practising L. Inst. 1979-1980)

"To What Degree Do the Federal Laws Limit the Controls That the Seller Can Impose Upon the Buyer," J. Rill, Distribution 471 (L. J. Seminars - Press 1981)

"Dual Distribution," J. Rill, Distribution 293 (L. J. Seminars - Press 1984)

"Limits on the Seller's Own Pricing: Recent Developments Under the Robinson-Patman Act," J. Rill, Distribution 195 (L. J. Seminars - Press 1980)

"Institutional Barriers to FTC Efficiency -- Can They Be Overcome," J. Rill, Legal Times, Nov. 1987

"Deception Proposals Call For Return to Common Sense," J. Rill & J. Oldham, Legal Times (undated)

The First Fifty Years, J. Rill (Practising L. Inst. 1983)

"The Failing Company Defense: Real or Illusion?", 5 Mergers & Acquisitions 29 (Nov. - Dec. 1970)

"At What Price May Seller Sell?", J. Rill, Chapter 3 in Legal Aspects of Selling & Buying (P. Zeidman ed. 1983)

"Price, Promotion, and Service Discrimination," J. Rill, Chapter 4 in Antitrust Advisor (Hills 3d ed. 1985)

"Chairman's Letter," J. Rill, Antitrust 2 (Winter 1988)

"Chairman's Letter," J. Rill, Antitrust 2 (Summer 1988)

"Chairman's Letter," J. Rill, Antitrust 2 (Fall 1987)

Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, M. Kirkpatrick, J. Bernstein, M. Brockmeyer, N. Buc, S. Calkins, C. Collier, K. Elzinga, E. Gellhorn, C. Hobbs, B. Mezines, A. Morrison, T. Muris, R. Pitofsky, J. Rill, E. Rockefeller, J. Rosch, A. Silberman, C. Sunstein, W. Webster, reprinted in 56 Antitrust & Trade Reg. Rep. No. 1410 special supp. (Apr. 6, 1989)

*The above listing represents my best effort to identify all publications and reported speeches and newspaper articles. Our search included the Journal of Legal Periodicals, Westlaw Index to Legal Periodicals, and my own files. I have no knowledge of any publications not listed.

ATTACHMENT II

I. BIOGRAPHICAL INFORMATION (PUBLIC)

15. Legal Career:

Since graduation from law school in 1959, I have been affiliated with Collier, Shannon, Rill & Scott of Washington, D.C., and predecessor firms. I have been a partner since January 1, 1964.

My practice has primarily focused on the representation of clients in the field of antitrust and trade regulation and has involved counseling, representation of clients in investigations by federal and state antitrust agencies and appearances before the Federal Trade Commission and federal courts. I have appeared in federal court and before the Federal Trade Commission on a number of occasions in antitrust matters and have argued major motions, questioned and cross-examined witnesses and appeared on various ancillary issues, such as discovery, venue, juridiction, scheduling, etc. All appearances have been in civil nonjury and administrative matters; however, I have represented corporations and individuals in a number of grand jury investigations, none of which resulted in an indictment of my client.

Typical clients include trade associations (Food Marketing Institute, National Broiler Council) and retail and manufacturing corporations (Safeway Stores, Inc., Interco, R. J. Reynolds Tobacco Co., Cyclops Corporation, Winn-Dixie Stores, Inc., Marshall Durbin Food Corporation, Murray Ohio Manufacturing Co.).

By far the largest preparation of antitrust cases in which I participated were settled. Those cases in which I participated involving either final judgment without settlement or which were settled after significant judicial developments include:

In re Beef Industry Antitrust Litigation, 1977-2 Trade Cas. (CCH) ¶61,794 (N.D. Tex. 1977) (complaint dismissed), rev'd and remanded, 600 F.2d 1148 (5th Cir. 1979), on remand, 542 F.Supp. 1122 (N.D. Tex. 1982), aff'd, 710 F.2d 216 (5th Cir. 1983), cert. denied, 465 U.S. 1052

(1984). Chief counsel for defendant Food Marketing Institute and Chairman of Defense Coordinating Committee. Case settled after summary judgment for defendants affirmed by Fifth Circuit and petition for certiorari denied by the Supreme Court.

Winn-Dixie Stores, Inc. v. FTC, 377 F.Supp. 773 (M.D. Fla. 1974). Chief counsel for Winn-Dixie. Successfully presented injunctive action against Federal Trade Commission to enforce most-favored-nation provisions of merger cease and desist order.

United States v. Safeway Stores, Inc. 1957 Trade Cas. (CCH) ¶68,871 (N.D. Tex. 1957) (consent decree), terminated, 1984-1 Trade Cas. (CCH) ¶65,824 (N.D.Tex. 1983). Chief counsel for Safeway in decree termination, granted over opposition of intervening parties.

FTC v. Ashland Oil, Inc., 108 F.T.C. 51 (1986) (consent order), 1984-1 Trade Cas. (CCH) ¶ 66,041 (N.D. Ohio 1984) (preliminary injunction). Chief counsel for Ashland Oil case settled after FTC obtained preliminary injunction against Bass Brothers' acquisition of Ashland's carbon black assets.

In re Fuel Oil Cases, Nos. 77-742, 78-467, 78-169 (M.D. FL. settlement approved Nov. 20, 1981). Chief counsel for defendant Tauber Oil Co. Case settled after substantial discovery.

In re Chicken Antitrust Litigation, 560 F.Supp. 998 (N.D. Ga. 1980), aff'd, 669 F.2d 228 (5th Cir. 1982), aff'd, 1987-1 Trade Cas. (CCH) ¶67,450 (11th Cir. 1987). Principal counsel for Marshall Durbin Food Corp. Successfully presented venue motion requiring refiling and facilitating settlement.

Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc., 446 F.2d 353 (5th Cir. 1971). Chief counsel for plaintiffs in attempted monopolization injunctive action. Prepared complaint and motion for preliminary injunction and argued case on appeal. Case was dismissed after grant of preliminary injunction reversed on appeal.

In addition, I have appeared in court as principal attorney in at least four agency subpoena enforcement matters and have been counsel of record in a number of antitrust matters, for both plaintiffs and defendants, which are pending or were settled prior to any significant judicial actions.

ATTACHMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. Litigation:

Citation:	*Winn-Dixie Stores, Inc. v. FTC*, 377 F. Supp. 773 (M.D. Fla. 1974).
Summary:	Winn-Dixie filed an injunctive action against the Federal Trade Commission to enforce a most-favored-nation clause in a Clayton Act § 7 order. Following briefing and oral argument before the District Court, the Commission was enjoined from enforcing the order other than on the basis sought by Winn-Dixie.
Party Represented:	Principal attorney for Winn-Dixie.
Nature of Participation:	Prepared Complaint and Motion for Preliminary and Permanent Injunction and presented oral argument in the United States District Court.
Final Disposition:	Injunction entered against the Commission.
Date of Representation:	1974.
Name of Court and Judge:	United States District Court for the Middle District of Florida; Judge Charles S. Scott.

Individual Names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

Co-Counsel:

J. Shepard Bryan, Jr., Esquire
Winn-Dixie Stores, Inc.
Post Office Box B
Jacksonville, Florida 32203
(904) 783-5000

Counsel for Defendants:

Calvin J. Collier, Esquire
General Counsel
Gerald Harwood, Esquire
Acting Assistant General Counsel
Karl H. Buschman, Esquire
Attorney
Federal Trade Commission
Washington, D.C.
(202) 326-2000

U. S. Attorney (Daley)
409 Post Office Building
311 West Monroe Street
Jacksonville, Florida 32201
(904) 791-2682

John R. Fieder, Esquire
Attorney
Department of Justice
Washington, D.C.
(202) 633-2000

ATTACHMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. Litigation

Citation: *In re Fuel Oil Cases*, Nos. 77-742, 78-467, 78-169 (M.D. Fla. settlement approved Nov. 20, 1981).

[Original action, *Florida Power Corp. v. Granlund, et. al.*, No. 77-742 (M.D. Fla. complaint filed Sept. 19, 1977), was consolidated in a class action in the United States District Court for the Middle District of Florida.]

Summary: Class action brought by the State of Florida. Plaintiff complained that defendants conspired, combined and agreed to fix or effect the price of No. 2 and No. 6 fuel oil unreasonably restraining interstate trade in violation of Section 1 of the Sherman Act.

Party Represented: Principal attorney for defendant, Tauber Oil.

Nature of Participation: Briefed and argued major motions on complaint amendment and discovery, conducted deposition of major co-defendant, negotiated settlement.

Final Disposition: Class action suit was settled.

Date of Representation: 9/1977-9/1981.

Name of Court and Judge: United States District Court for the Middle District of Florida; Judges Ben Krentzman and George C. Carr.

Individual Names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

See Appendix to this Attachment (due to the large number of counsel involved in the class action the attached list is inclusive to the best of my knowledge).

William E. Hahn, Esquire
Shear, Newman & Hahn
711 North Florida Avenue, Suite 350
Tampa, Florida 33601
(813) 228-8530
Attorney for Tauber Oil Company

Sylvia H. Walbolt, Esquire
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000
and
S. A. Brandimore, Esquire
Attorney at Law
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733
Telephone (no listing)
Attorneys for Florida Power Corporation

Ann F. Cohen, Esquire
Thomas H. Peebles, Esquire
Attorneys, Department of Justice
10th & Pennsylvania Avenue, N.W.
Civil Division - Room 3330
Washington, D.C. 20530
(202) 633-3301
and
Judy S. Rice, Esquire
Assistant U.S. Attorney
U.S. Department of Justice
410 Robert Timberlake Building
500 Zack Street
Tampa, Florida 33602
(813) 225-7300
Attorneys for U.S. Department of Energy and Charles W. Duncan, Jr., Secretary of U.S. Department of Energy and the United States

Richard T. Earle, Jr., Esquire
Earle and Earle
P.O. Box 416
St. Petersburg, Florida 33701
(813) 898-4474
and
Bernard J. Masterson, Esquire
Masterson, Rogers & Patterson
443 3rd Avenue North, Suite 208
St. Petersburg, Florida 33701
(813) 898-4659
Attorneys for A. P. Perez

Ronald K. Cacciatore, Esquire
Attorney at Law
725 East Kennedy Boulevard
Tampa, Florida 33602
(813) 223-4831
and
D. Frank Winkles, Esquire
Winkles & Trombley, P.A.
412 Madison Street, Suite 100
Tampa, Florida 33602
(813) 229-7918
Attorneys for Richard E. Raymond

Ellis C. McCullough, Esquire
Attorney at Law
806 Main Street Building, Suite 900
Houston, Texas 77002
(713) 774-2100
Attorney for James R. Clark

Loyd C. Mosley, Esquire
Attorney at Law
501 South Ft. Harrison Avenue, Room 209
Clearwater, Florida 33516
(813) 446-4059
and
Alex D. Finch, Esquire
Attorney at Law
501 South Ft. Harrison Avenue, Room 202
Clearwater, Florida 33516
(813) 446-1071
Attorneys for Pat Imperato and Zenith Industries

Michael McK. Wilson, Esquire
Assoc. Public Counsel
Room 4, Holland Building
Tallahassee, Florida 32301
Telephone (no listing)
Attorney for Public Counsel

Theodore C. Taub, Esquire
Taub & Williams]
P.O. Box 2312
Tampa, Florida 33601
(813) 228-8000
and
Louis H. Shereff, Esquire
Shereff Brothers
19 West 44th Street
New York, New York 10036
(212) 840-7725
Attorneys for Walter L. Ballard

Melvyn L. Cantor, Esquire
Simpson, Thacher & Bartlett
One Battery Park Plaza
New York, New York 10004
(212) 455-2000
and
Robert Feagin, III, Esquire
Holland & Knight
P.O. Drawer 810
Tallahassee, Florida 32302
(904) 224-7000
Attorneys for Aminoil USA, Inc.

Paul Bloom, Esquire
Deputy General Counsel
U.S. Department of Energy
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20461
Attorney for U.S. Department of
Energy and James R. Schlesinger,
Secretary of U.S. Department of Energy
(202) 586-6210

K. Charles Peterson, Esquire
Reynolds, Allen & Cook
1100 Milam Building, Suite 1600
Houston, Texas 77002
(713) 651-1300
and
Richard M. Mitzel, Esquire
Mitzel & Silver
701 East Washington
Tampa, Florida 33602
(813) 223-9776
Attorneys for Ray Granlund and Rotary Oil Company

G. Ernest Caldwell, Esquire
Caldwell & Baggott
2919 Allen Parkway, Suite 330
Houston, Texas 77019
(713) 659-2100
and
William T. Keen, Esquire
P.O. Box 1527
Tampa, Florida 33601
Telephone (no listing)
Attorneys for John L. Burns and Larcon Petroleum Inc.

Robert R. Vawter, Jr., Esquire
Shackleford, Farrior, Stallings & Evans, P.A.
P.O. Box 3324
Tampa, Florida 33602
(913) 273-5000
Attorney for Charter International Oil Company

Andrew L. Jefferson, Jr., Esquire
Jefferson & Maley, P.C.
2260 Two Shell Plaza
777 Walker Street
Houston, Texas 77002
(713) 654-9009
Attorney for Ronald Pruitt and Matrix Properties, Inc.

Bill L. Bryant, Jr., Esquire
Chief, Antitrust Section
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301
(904) 488-9105

ATTACHEMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. Litigation:

Citation: *In re Chicken Antitrust Litigation*, 560 F.Supp. 998 (N.D. Ga. 1980), *aff'd*, 669 F.2d 228 (5th Cir. 1982), *aff'd*, 1987-1 Trade Cas. (CCH) ¶67,450 (11th Cir. 1987).

[*State of Alabama v. Marshall Durbin Food Corp.*, No. CA 77-M0179 (N.D. Ala. complaint filed Feb. 8, 1977) was consolidated with other similar actions in the United States District Court for the Northern District of Georgia.]

Summary: Class action suit brought by direct and indirect purchasers claiming a conspiracy to fix prices and reduce production of broiler chickens.

Parties Represented: Principal attorney for defendant, Marshall Durbin Food Corp.

Nature of Participation: Successfully presented venue and jurisdiction motion and negotiated first wave of settlements.

Date of Representation: 2/1977-1987.

Final Disposition: The class action was settled.

Name of Court and Judge: United States District Court for the Northern District of Georgia; Judge William C. O'Kelley.

United States Court of Appeals for the Eleventh Circuit; Circuit Judges John C. Godbold and Robert S. Vance and Senior Circuit Judge Luther M. Swygert.

United States Court of Appeals for the Fifth Circuit; Circuit Judges Robert M. Hill and Vance and District Judge Seybourn H. Lynne sitting by designation.

Individual Names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

See Appendix to this Attachment (due to the large number of counsel involved in the class action the attached list is inclusive to the best of my knowledge).

(404) 572-6600	Mr. Edward E. Dorsey Powell, Goldstein, Frazer & Murphy 1100 C & S National Bank Building Atlanta, Georgia 30303
(404) 658-8700	Mr. James R. McGibbon Sutherland, Asbill & Brennan 3100 First National Bank Tower Atlanta, Georgia 30303
(409) 632-3381	Mr. James R. Cornelius Zelesky, Cornelius, Rogers, Berry & Hallmark P. O. Drawer 1728 Lufkin, Texas 75901
(404) 577-5100	Mr. Allen K. Hirsch Arnall, Golden & Gregory 10th Floor Fulton Federal Building Atlanta, Georgia 30303
(404) 881-0183	Mr. John A. Sibley, III 1430 Trust Company Tower 25 Park Place Atlanta, Georgia 30303
(501) 321-1931	Mr. Stan Miller Grand National Bank Building Hot Springs, Arkansas 71901
(404) 233-1222	Mr. John A. Dunaway Dunaway, Haas & Broome 2964 Peachtree Road, N. W. Suite 440 Atlanta, Georgia 30305
(202) 785-9700	Mr. Joel B. Kleinman Dickstein, Shapiro & Morin 2101 L Street, N. W. Washington, D. C. 20037
(404) 659-6700	Mr. C. David Vaughan 909 Peachtree Center Cain Tower Atlanta, Georgia 30303
(404) 365-9090	Mr. Stanley P. Meyerson Westmoreland, Hall, McGee, Warner & Oxford 2800 Tower Place 3340 Peachtree Road, N. E. Atlanta, Georgia 30325
((404) 881-4100	Mr. Emmet J. Bondurant Trotter, Bondurant, Griffin, Miller & Hishon 2200 First National Bank Tower Two Peachtree Street, N. E. Atlanta, Georgia 30303
(404) 521-1282	Mr. Edward L. Savell Savell, Williams, Cox & Angel 2222 Equitable Building 100 Peachtree Street, N. W.

(202) 783-0800	Mr. John R. Fornaciari Mr. Ralph J. Savarese Howrey & Simon 1730 Pennsylvania Avenue, N. W. Washington, D. C. 20006
no listing	Mr. H. Franklin Waters Crouch, Blair, Cypert & Waters P. O. Box 869 Springdale, Arkansas 72764
(202) 342-8400	Mr. James F. Rill Collier, Shannon, Rill, Edwards & Scott 1055 Thomas Jefferson Street, N. W. Washington, D. C. 20006
no listing	Mr. James B. Blair Crouch, Blair, Cypert & Waters P. O. Box 869 Springdale, Arkansas 72764
no listing	Mr. J. Gaston Williamson Rose, Nash, Williamson, Carroll, Clay & Giroir 720 W. Third Street Little Rock, Arkansas 72201
(404) 536-0101	Mr. Joe K. Telford Telford, Stewart & Stephens P. O. Box 430 Gainesville, Georgia 30501
(212) 373-3000	Mr. Sidney Stein Paul, Weiss, Rifkind, Wharton & Garrison 345 Park Avenue New York, New York 10022
no listing	Mr. Fredrick H. von Unwerth Alston, Miller & Gaines 1200 C & S National Bank Building Atlanta, Georgia 30303
(212) 371-5900	Mr. Jeffrey A. Fillman Finley, Kumble, Wagner, Heine & Underberg 425 Park Avenue New York, New York 10022
(202) 662-6000	Mr. James McKay Covington & Burling 888 Sixteenth Street, N. W. Washington, D. C. 20006
(404) 656-1800	Mr. Thomas Rhodes Gambrell, Russell, Killorin & Forbes 400 First National Bank Tower Atlanta, Georgia 30303
(404) 262-2000	Mr. Joseph Lefkoff Kaler, Lefkoff, Pike & Fox P.C. Suite 1727, 100 Colony Square 1175 Peachtree Street, N. E. Atlanta, Georgia 30361

Mr. James M. Landis
Carlton, Fields, Ward, Emmanuel, Smith &
Cutler, P.A.
(813) 223-70000 P. O. Box 3239
Tampa, Florida 33601

Mr. Arthur J. Galligan
Dickstein, Shapiro & Morin
(202) 785-9700 2101 L Street, N. W.
Washington, D. C. 20037

Mr. Solly Robins
Robins, Davis & Lyons
(612) 224-8000 1210 Minnesota Building
St. Paul, Minnesota 55101

Joseph R. Bankoft
King & Spalding
2500 Trust Company Tower
(404) 572-4600 Atlanta, GA 30303

ATTACHMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. Litigation:

Citation: *In re Safeway Stores, Inc.*, 91 F.T.C. 975 (1978).

Summary: FTC complained that respondent overpriced and overcharged advertised items in retail food stores in violation of Section 5 of the FTC Act.

Party Represented: Attorney for respondent, Safeway Stores, Inc.

Nature of Participation: Principal attorney for respondent, conducted and defended depositions, prepared and argued motions, prepared pre-trial briefs.

Date of Representation: 9/1975-5/1978.

Final Disposition: Respondent withdrew from adjudication and entered into a consent agreement.

Name of Court and Judge: Federal Trade Commission; Administrative Law Judge Lewis F. Parker.

Individual Names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

For The Commission:

Robert E. Easton, Esquire
(202) 326-3029
James J. Angelone, Esquire
Federal Trade Commission
6th & Pennsylvania Avenue, NW
Washington, DC 20580

ATTACHMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. Litigation:

Citation: In re Bass Brothers Enterprises, Inc., Sid Richardson Carbon & Gasoline Co., Ashland Oil, Inc., 108 F.T.C. 51 (1986); FTC v. Bass Brothers Enterprises, Inc, et al., 1984-1 Trade Cas. (CCH) ¶ 66,041 (N.D. Ohio 1984) (preliminary injunction).

Summary: FTC complained that the proposed acquisition of the Carbon Black Division of Ashland Chemical Co., a division of Ashland Oil, Inc. by Bass Brothers Enterprises, Inc. and Sid Richardson Carbon & Gasoline Co. may substantially lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

Party Represented: Principal attorney for respondent, Ashland Oil, Inc.

Nature of Participation: Made presentations to Commission, argued in court against FTC's motion for preliminary injunction, examined Chief Executive Officer of Ashland Oil.

Final Disposition: After preliminary injunction entered, respondents withdrew from adjudication and entered into a consent agreement.

Date of Representation: 5/1984-8/1986.

Name of Court and Judge: Federal Trade Commission; Administrative Law Judge Lewis F. Parker, Commissioners Daniel Oliver, Patricia P. Bailey, Terry Calvani, Mary L. Azcuenaga and Andrew J. Strenio, Jr.

United States District Court for the Northern District of Ohio; Judge George W. White.

Individual Names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

Co-Counsel: Attorneys for Sid Richardson Carbon & Gasoline Co. and Bass Bros. Enterprises, Inc.

Charles E. Koob, Esquire
Joseph F. Tringali, Esquire
Deborah M. Reyner, Esquire
Simpson, Thacher & Bartlett
One Battery Park Plaza
New York, NY 10004
(212) 455-2000

John McClatchey
Thompson, Hine & Flory
1100 National City Bank Building
629 Euclid Avenue
Cleveland, Ohio 44114
(216) 566-5500

Attorney for Ashland Oil

John C. Biehl, Esquire
Ashland Oil, Inc.
P.O. Box 391
Ashland, KY 41114
(606) 329-3333

For The Commission:

John B. Warden, Esquire
(202) 326-2145
John H. Carley, Esquire
Ernest J. Isenstadt, Esquire
(202) 326-2473
Michael Wise, Esquire
(202) 326-2150
Robert P. Weaver, Esquire
Steven B. Feirman, Esquire
Edward F. Glynn, Jr., Esquire
(202) 326-2948
Federal Trade Commission
6th & Pennsylvania Avenue, NW
Washington, DC 20580

ATTACHMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. *Litigation:*

Citation:	*United States v. United Shoe Machinery Corp.*, 266 F. Supp. 328 (D. Mass. 1967), *rev'd*, 391 U.S. 244 (1968).
Summary:	Review of an antitrust consent decree provided for under the term of initial decree.
Party Represented:	Principal attorney for *amici curiae* National Footwear Manufacturers Ass'n and New England Footwear Ass'n, Inc.
Nature of Participation:	Successfully argued the right of *amici curiae* to present evidence and prepared briefs of *amici* in District Court and the United States Supreme Court.
Final Disposition:	The District Court in its opinion acknowledged the contribution of *amici curiae* and denied the government's request to modify the decree. The Supreme Court reversed the District Court's decision.
Date of Representation:	1967 - 1968
Name of Court and Judge:	United States District Court for the District of Massachusetts; Chief Judge Wyzanski. United States Supreme Court; Chief Justice Earl Warren, Associate Justices Hugo L. Black, William O. Douglas, John M. Harlan, William J. Brennan, Jr., Potter Stewart, Byron R. White, Abe Fortas and Thurgood Marshall.

Individual Names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

Co-Counsel:

Benjamin A. Trustman
John R. Halley
Nutter, McClennan & Fish
75 Federal Street
Boston, Mass.
(617) 439-2000

Counsel for Plaintiff:

Paul F. Markham
U.S. District Attorney
Erwin N. Griswold
Solicitor General
Donald T. Turner
Asst. Attorney General
Francis X. Beytagh, Jr.
Asst. to the Solicitor General

Howard E. Shapiro
W. Randolph Elliot
Thomas R. Asher
Margaret H. Brass
James C. Campbell
Robert J. Ludwig
Attorneys
Department of Justice
Washington, DC
(202) 633-2000

Counsel for Defendant:

Ralph M. Carson
Taggart Whipple
Louis L. Stanton, Jr.
Davis, Polk, Wardwell, Sunderland & Kiendle
1 Chase Manhatten Plaza
New York, NY 10005
(212) 530-4000

Conrad W. Oberdorfer
Choate, Hall & Stewart
Exchange Place
53 State Street
Boston, Mass. 02109
(617) 227-5020

ATTACHMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. Litigation:

Citation:	In re Food Fair Stores, Inc., et al., H.C. Bohack Co., Inc., et al., Jewel Companies, Inc., et al., Borman Food Stores, Inc., First National Stores, Inc., et al., 83 F.T.C. 1213 (1974).
Summary:	FTC alleged in its Complaint that food chains and brokers had induced and received illegal brokerage allowances in violation of the Robinson-Patman Act.
Party Represented:	Attorney for John P. Storm Corp., Jack Stires, Inc. and John C. Stires, II.
Nature of Participation:	Chief counsel for major brokerage respondents; interviewed and examined witnesses, prepared and argued dismissal motions, prepared motions for summary judgment.
Final Disposition:	Summary judgment was entered for all respondents.
Date of Representation:	7/1969 - 1/1974.
Name of Court and Judge:	Federal Trade Commission; Adminstrative Law Judges Raymond J. Lynch and Andrew C. Goodhope; Commissioners Lewis A. Engman, Paul Rand Dixon, Mayo J. Thompson and M. Elizabeth Hanford.

Individual Names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

Co-Counsel:	Attorneys for Food Fair Stores, Inc. and World Wide Produce Co., Inc. Shipley, Akerman, Stein & Kaps Washington, D.C. Telephone (no listing) Stein & Rosen 437 Madison Avenue New York, New York 10022 (212) 557-1520

Attorneys for Hallee-Boy Sales, Inc.
and Irin Arost

Subin, Shams & Rosenbluth
111 N. Orange Street, Suite 900
Orlando, Florida 32801
(407) 841-7470

Attorneys for Jewel Companies, Inc.

McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois
(312) 372-2000

For the Commission:

Louis R. Sernoff
Lewis F. Parker
(202) 326-3632
Francis C. Mayer
Martin A. Rosen
James C. Donoghue
Eliot G. Disner
Federal Trade Commission
Washington, DC 20580
(202) 326-2000

ATTACHMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. *Litigation:*

Citation: *In re Beef Industry Antitrust Litigation*, 1977-2 Trade Cas. (CCH) ¶61,794 (N.D. Tex. 1977) (complaint dismissed), *rev'd and remanded*, 600 F.2d 1148 (5th Cir. 1979), *on remand*, 542 F.Supp. 1122 (N.D. Tex. 1982), *aff'd*, 710 F.2d 216 (5th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

Summary: Plaintiffs (cattlemen, ranchers and feeders) charged that the retail chain defendants combined, primarily by using the defendant trade association and price reporting publication, to fix at artificially low levels the prices at which beef is purchased from slaughterhouses and meat packers and ultimately from the producers -- cattle ranchers and feeders -- alleging that the concerted activities of the defendants violated Sections 1 and 2 of the Sherman Act.

Party Represented: Attorney for defendant, Food Marketing Institute.

Nature of Participation: Principal attorney for Food Marketing Institute and Chairman of Defense Coordinating Committee, participated in all facets of case, argued venue and discovery issues, negotiated with plaintiffs and participated in briefing dispositive motions.

Final Disposition: Plaintiffs' motion for summary judgment granted.

Date of Representation: 1977-1984.

Name of Court and Judge: United States District Court for the Northern District of Texas; Judge Patrick E. Higginbothan (1982), Judge Taylor (1977).

United States Court of Appeals for the Fifth Circuit; Circuit Judges John Minor Wisdom, Robert M. Hill and Fay (1979), Circuit Judges Thomas M. Reavley and Sam D. Johnson and District Judge Wyzanski sitting by designation (1983).

Individual Names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

See Appendix to this Attachment (due to the large number of counsel involved in the class action the attached list is inclusive to the best of my knowledge).

BEEF RETAIL DEFENSE COUNSEL SERVICE LIST
April 1985

Wayne B. Slaughter, Esquire (208) 344-6000
Jess B. Hawley, Esquire
Hawley, Troxell, Ennis & Hawley
7th Floor
One Capital Center
P.O. Box 1617
Boise, Idaho 83701
ALBERTSON'S, INC.

Miles Kirkpatrick, Esquire 872-5250
Mike Kelly, Esquire 872-7621
Morgan, Lewis & Bockius
Suite 800, North Lobby
1800 M Street, N.W.
Washington, D.C. 20036
AMERICAN STORES CO.

Roy Lewis Shults, Esquire (213)556-4307
Mitchell, Silberberg & Knupp
Ninth Floor
1800 Century Park East
Los Angeles, California 90067
ARDEN-MAYFAIR, INC.

Bradley Hummel, Esquire (614) 224-6285
Gingher & Christensen
311 East Broad Street
Columbus, Ohio 43215
BIG BEAR STORES

Sylvan Rapaport, Esquire (313) 835-9500
c/o Borman's, Inc.
P.O. Box 446
Detroit, Michigan 48232
BORMAN'S, INC.

Eugene Driker, Esquire (313) 965-9725
Charles Rudy, Esquire
Barris, Sott, Denn & Driker
First Federal Building, 21st Floor
1001 Woodward Avenue
Detroit, Michigan 48226
BORMAN'S, INC.

Debbie Hiller, Esquire (216) 781-2166
John D. Leech, Esquire
Calfee, Halter & Griswold
1800 Central National Bank Building
Cleveland, Ohio 44114
FIRST NATIONAL SUPERMARKETS, INC.

James F. Rill, Esquire 342-8430
Collier, Shannon, Rill & Scott
Suite 308
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
NAT'L ASS'N OF FOOD STORE CHAINS
(FOOD MARKETING INSTITUTE)

Harry R. Sullivan, Esquire 452-8444
Food Marketing Institute
Suite 700
1750 K Street, N.W.
Washington, D.C. 20006

John L. Hauer, Esquire (214) 655-2800
Akin, Gump, Strauss, Hauer & Feld
2800 Republic National Bank Building
Dallas, Texas 75201

Bernard Gordon, Esquire 857-4000
Finley, Kumble, Wagner, Heine, Underberg & Casey
10th Floor
1120 Connecticut Avenue
Washington, D.C. 20036
GIANT FOOD, INC.

Shep Goldfein, Esquire (212) 371-6000
Douglas Adler, Esquire
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, New York 10022
GRAND UNION CO.

Henry Bisgaier, Esquire (212) 701-3000
Larry Silverman, Esquire
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
THE GREAT ATLANTIC & PACIFIC TEA CO.

Theodore A. Groenke, Esquire (312) 984-7704
Walt Jones, Esquire
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
JEWEL CO., INC.

Alexander Bennett, Esquire 872-6663
Robert S. Thorpe, Esquire
Arnold & Porter
1200 New Hamphsire Avenue, N.W.
Washington, D.C. 20036
THE KROGER CO.

Arnold M. Lerman, Esquire 872-6309
C. Loring Jetton, Jr., Esquire 872-6263
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
LUCKY STORES, INC.

Larry Strickling, Esquire (312) 861-2000
Kirkland & Ellis
200 E. Randolph Drive
Chicago, Illinois 60601
THE NATIONAL PROVISIONER, INC.

Jeffrey S. Davidson, Esquire 879-5010
Kirkland & Ellis
655 15th Street, N.W.
Washington, D.C. 20005
THE NATIONAL PROVISIONER, INC.

Judith L. Hart, Esquire (214) 522-7444
Lawrence G. Newman Corp.
Suite 200
3402 McFarlin
Dallas, Texas 75205
THE NATIONAL PROVISIONER, INC.

Franklin P. Auwarter, Esquire (312) 782-0600
Ned Robertson, Esquire
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
NATIONAL TEA CO.

David A. Rosen, Esquire (212) 489-0220
Stein, Simpson & Rosen
1370 Avenue of the Americas
New York, New York 10019
PANTRY PRIDE, ENTERPRISES INC. f/k/a FOOD FAIR, INC.

Jan Charles Gray, Esquire (213) 637-7791
Ralphs Grocery Co.
P.O. Box 54143
Los Angeles, California 90054
RALPHS GROCERY CO.

Les J. Weinstein, Esquire (213) 622-4222
Blecher, Collins & Weinstein
28th Floor
611 West Sixth Street
Los Angeles, California
RALPHS GROCERY CO.

Robert H. Scott, Esquire (513) 381-5300
Federated Department Stores
7 West 7th Street
Cincinnati, Ohio 45202
RALPHS GROCERY CO.

Richard W. Odgers, Esquire (415) 983-1116
James Warren, Esquire (415) 983-1037
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94120
SAFEWAY STORES, INC.

Donald Holbrook, Esquire (801) 521-3200
Andrew Buffmire, Esquire
Jones, Waldo, Holbrook & McDonough
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84104
SKAGGS COMPANIES, INC.

Robert D. Paul, Esquire (617) 523-5700
John Feltner, Esquire
Goodwin, Procter & Hoar
28 State Street
Boston, Massachusetts 02109
STOP & SHOP COS., INC.

James B. Kobak, Esquire (212) 709-7757
Hughes, Hubbard & Reed
One Wall Street
New York, New York 10005
SUPERMARKET GENERAL CORP.

Michael E. Bress, Esquire (612) 340-2836
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, Minnesota 55402
SUPER VALU STORES, INC.

Timothy J. Sargent, Esquire (213) 620-1000
Bodkin, McCarthy, Sargent & Smith
Fifty-First Floor
707 Wilshire Boulevard
Los Angeles, California 90017
THRIFTIMART, INC.

Charles P. Pillans, III, Esquire (904) 353-0211
John A. DeVault, III, Esquire
Bedell, Dittmar, DeVault, Pillans & Gentry
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
WINN-DIXIE STORES, INC.

Ernie Higginbotham, Esquire (214) 658-1517
Strasburger & Price
1200 One Main Place
Dallas, Texas 75202
DEFENDANT'S LIAISON COUNSEL

BEEF PLAINTIFF COUNSEL SERVICE LIST FOR THE RETAIL CASES

Lex Hawkins, Esquire (515) 288-6532
Glenn Norris, Esquire
HAWKINS & NORRIS
2801 Fleur Drive
Des Moines, Iowa 50321
(COUNSEL FOR MPIA, BECKER, BECKER-DC)

John Cochrane, Esquire (612) 289-1950
COCHRANE & BRESNAHAN
500 Cochrane & Bresnahan Building
360 Wabash Street
St. Paul, Minnesota 55102
(COUNSEL FOR MPIA, BECKER, BECKER-DC)

James W. Witherspoon, Esquire (806) 364-1100
WITHERSPOON, AIKEN & LANGLEY
Post Office Box 1818
Hereford, Texas 79045
(COUNSEL FOR BLACK II)

Joseph M. Alioto, Esquire (415) 434-2100
ALIOTO & ALIOTO
Suite 2100
One Eleven Sutter Street
San Francisco, California 94104
(COUNSEL FOR LITTLE RANCH)

Ben L. Krage, Esquire (214) 969-7500
KASMIR, WILLINGHAM & KRAGE
1300 Bryan Tower
Dallas, Texas 75201
(RETAIL PLAINTIFFS LIAISON COUNSEL)

Morris Harrell, Esquire (214) 740-8404
RAIN, HARRELL, EMERY, YOUNG & DOKE
4200 Republic Bank Tower
Dallas, Texas 75201
(PACKER DEFENDANTS LIAISON COUNSEL)

ATTACHMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. Litigation:

Citation:	*United States v. Safeway Stores Inc.*, 1957 Trade Cas. (CCH) ¶68,871 (N.D. Tex. 1957) (consent decree), *terminated*, 1984-1 Trade Cas. (CCH) ¶65,824 (N.D. Tex. 1983).
Summary:	The 1957 decree arose out of criminal and civil litigation charging Safeway with various allegedly predatory acts primarily relating to trading stamp war in the Southwest during the early 1950s. Decree termination proceeding in which I participated was one of the major cases in Justice Department decree review program in early 1980's.
Party Represented: Inc.	Principal attorney for defendant, Safeway Stores.
Nature of Participation:	Prepared legal memoranda and motion papers, negotiated termination with Department of Justice and negotiated with potential adverse parties.
Date of Representation:	June-November 1983.
Final Disposition:	Consent decree terminated.
Name of Court and Judge:	United States District Court for the Northern District of Texas; Judge David O. Belew, Jr.

Individual names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

Co-Counsel:	Donald I. Baker, Esquire Jones, Day, Reavis & Pogue 1735 Eye Street, N.W. Washington, D.C. 20006 (202) 861-3939
	W. B. West, III, Esquire Clark, West, Keller, Butler & Ellis 4949 First International Bldg. Dallas, TX 75270 (214) 741-1001
Attorney for plaintiff:	Bruce K. Yamanaga, Esquire Antitrust Division Department of Justice Washington, D.C. (202) 724-5775

ATTACHMENT III

I. BIOGRAPHICAL INFORMATION (PUBLIC)

16. Litigation

Citation:	*In re Detroit Auto Dealers Ass'n*, Dkt. 9189, *reprinted* 5 Trade Reg. Rep. (CCH) ¶ 22,653 (FTC Feb. 22, 1989), *appeal docketed*, Nos. 89-3388 to 3392 (6th Cir. May 8, 1989).
Summary:	FTC alleged in its complaint that since 1960 the dealers had conspired to limit the hours of dealership. The Commission decision overturns a 1987 ruling by the ALJ, which dismissed the charges, and upholds a 1984 FTC complaint. Appeal pending.
Party Represented:	Attorney for General Motors dealerships.
Nature of Participation:	Principal attorney for General Motors dealerships, examined economic expert and other witnesses for respondents, cross-examined complaint counsel's principal economic expert, argued before ALJ and FTC.
Final Disposition:	Final Commission decision and order on appeal in the United States Court of Appeals for the Sixth Circuit.
Date of Representation:	1984 to Present.
Name of Court and Judge:	Federal Trade Commission; Administrative Law Judge James P. Timony (initial decision), Commissioners Daniel Oliver, Terry Calvani, Mary L. Azcuenaga, Andrew Strenio and Margot Machol (final order). United States Court of Appeals for the Sixth Circuit; Panel not yet assigned.

Individual Names, Addresses, Telephone Numbers of Co-Counsel and Principal Counsel:

Co-counsel:

Lawrence F. Raniszeski, Esquire
Robert Y. Weller, II, Esquire
John P. Hartwig, Esquire
Columbo and Columbo
1500 N. Woodward Ave.
Suite 100
Birmingham, MI 48011
(313) 645-9300

Howard O'Leary, Esquire
Fred L. Woodworth, Esquire
Dykemema, Gossett, Spenser,
Goodnow & Trigg
1752 N St., N.W.
Sixth Floor
Washington, D.C. 20036
(202) 466-7185

Roy R. Hunsinger, Esquire
Stringari, Fritz, Kreger,
Ahearn & Hunsinger, P.C.
450 First National Bldg.
Detroit, MI 48226
(313) 961-6474

John F. Youngblood, Esquire
Abbott, Nicholson, Quilter,
Esshaki & Youngblood
1840 Buhl Bldg.
Detroit, MI 48226
(313) 963-2500

Glenn A. Mitchell, Esquire
BasiL J. Mezines, Esquire
David U. Fierst, Esquire
Stein, Mitchell & Mezines
1800 M St., N.W., Suite 1060-N
Washington, D.C. 20036
(202) 737-7777

For the Commission:

Jeffrey I. Zuckerman, Esquire
Director
(202) 326-2556

Ernest G. Nagata, Esquire
Assistant Director
(202) 326-2714

Richard B. Smith, Esquire
Morris A. Bloom, Esquire
Timothy Suich, Esquire
Federal Trade Commission
601 Pennsylvania Ave.
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2850

ATTACHMENT IV

I. BIOGRAPHICAL INFORMATION (PUBLIC)

17. Legal Activities:

In addition to the above described litigated matters, my practice has involved substantial antitrust counseling with respect to mergers and acquisitions, antitrust issues in distribution, and horizontal restraints. I have been principal attorney for a large number of manufacturing and distribution concerns in nonpublic merger and acquisition and horizontal restraint investigations by both the Department of Justice and the Federal Trade Commission. In each instance, I was responsible for developing the factual and legal arguments to the enforcement agencies, producing documents, representing witnesses in depositions and presenting arguments to the decisionmaking authorities.

I have also published several articles on antitrust questions in professional journals as listed on Attachment I (question no. 12) and have been active in the Antitrust Section of the American Bar Association, see response to question no. 9. While Chair of the Section in 1987-88, I appointed and served on a Special Committee to Study the Role of the Federal Trade Commission. The Committee issued its report in April, 1989. Another major activity during my term as Section Chair was the Section's effort to secure ABA support for modification of the McCarran-Ferguson Act.

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR NONJUDICIAL NOMINEES

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

In accordance with the terms of the Collier, Shannon, Rill & Scott partnership agreement, I will receive an allocation which will consist of my capital account, my assigned percentages of net income, and of net income based on adjusted accounts receivable determined as of the date of termination.

Income earned under retirement (Keogh) plan identified on page 3 of schedule A SF 278, attached. It is anticipated that the trust and fund will continue to earn income at approximately the same annual level.

In addition, I anticipate receiving minimal royalties from sales of Carla Hills Antitrust Advisor (3rd ed.) to which I contributed a chapter. Royalties in 1988 were less than $200.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

Should I be confirmed I will recuse myself from all matters in which I have been personally involved. All such matters will be identified in a recusal letter to be distributed to staff members at the time of entrance on duty and a system will be created in my office to have items screened. In addition, I will seek guidance from officials within the Department of Justice when potential conflicts arise and I intend to follow the recommendations set forth in the Administrative Conference Guidelines.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

Plan to continue as Trustee, The Bullis School, Potomac, MD. Position is without compensation.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   See attached Financial Disclosure Report, SF 278 with cover letter from Harry H. Flickinger, Assistant Attorney General for Administration to The Honorable Frank Q. Nebeker, Director, Office of Government Ethics (May 26, 1989).

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

   See attached financial net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   Held the position of precinct chairman for all party candidates for the Republican Party in Montgomery County Maryland during the 1980, 1982 and 1984 campaigns.

U.S. Department of Justice

Washington, D.C. 20530

OGC copy

MAY 26 1989

The Honorable Frank Q. Nebeker
Director, Office of Government Ethics
1201 New York Avenue
Suite 500
Washington, D. C. 20005

Dear Judge Nebeker:

In accordance with the provisions of Title II of the Ethics in Government Act of 1978, I am pleased to forward the Financial Disclosure Report of James F. Rill, who has been nominated by President Bush to serve as Assistant Attorney General, Antitrust Division, United States Department of Justice.

The following matters have been discussed and resolved with Mr. Rill:

1. The Antitrust Division, after a review of the financial interests disclosed by the Report, has determined that none of the interests disclosed presents a conflict of interest at this time. When he is confirmed, Mr. Rill will circulate to his staff a list of his financial interests and, if matters arise in the Division that present conflicts with those interests, he will recuse himself from participation in those matters, dispose of the investment giving rise to the conflict, or seek an appropriate waiver in accordance with the provisions of 18 U.S.C. § 208(b).

2. The Report discloses that Mr. Rill is a Director of the Marshall Durbin Food Corporation (Birmingham, Alabama), a member of the Advisory Board of the Antitrust and Trade Regulation Report published by the Bureau of National Affairs, and a member of the Board of Trustees of the Bullis School in Potomac, Maryland. He intends to resign from all but the Bullis School trusteeship, and the Antitrust Division sees no conflict of interest in his retaining that position.

3. Mr. Rill is currently employed as a partner in the law firm of Collier, Shannon, Rill and Scott in Washington, D.C. With the limited exception of his participation in the firm's Keogh plan, Mr. Rill plans to sever completely his relationship with the firm. He will receive a return of his capital contribution plus a final distribution of fees that are owed to

him in accordance with the firm's partnership agreement. He will retain his interest in the law firm's Keogh retirement plan as permitted by 18 U.S.C. § 209. Mr. Rill exercises no control over the investments of the Collier, Shannon, Rill and Scott Retirement Plan for Partners; in fact, the firm's plan is administered by the Riggs Bank (Trust Group) as part of the Riggs Liquid Assets Fund (total Fund value, $91.2 million on March 31, 1989). While the Riggs Fund portfolio is considered diversified by the bank, it does not meet the OGE definition of a widely-diversified plan (OGE letters to Janis A. Sposato dated June 23, 1988, and October 24, 1988). For this reason, Mr. Rill has attached a list of the individual assets currently held by the Fund (the Riggs Liquid Assets Fund) to Schedule A of his report. The Department's regulation governing the exemption from the prohibition of 18 U.S.C. § 208(a), at 28 C.F.R. § 45.735-5(b), will be applied with regard to Mr. Rill's Keogh plan.

In light of the above, I am confident that Mr. Rill's Report discloses no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,

Harry H. Flickinger
Assistant Attorney General
for Administration

Enclosures

p. 1

COLLIER, SHANNON, RILL & SCOTT
RETIREMENT PLAN FOR PARTNERS

PERSONAL STATEMENT FOR JAMES F. RILL
AS OF DECEMBER [illegible], 1988

	FIXED ACCOUNT	EQUITY ACCOUNT	LOANS
BALANCE 1/1/88	312,515.45	0	0
1988 CONTRIBUTION	30,000.00	0	0
PLAN EARNINGS	21,809.23	0	0
TOTAL ADDITIONS	51,809.23	0	0
BALANCE 12/31/88	364,324.68	0	0
VESTED PERCENT	100%	100%	100%
VESTED AMOUNT	364,324.68	0	0
TOTAL ACCOUNT BALANCE	364,324.68		

OUR RECORDS INDICATE YOUR:
(1) DATE OF BIRTH IS 3/4/33
(2) DATE OF HIRE IS 1/1/59
(3) NORMAL RETIREMENT DATE IS 4/1/1998

PREPARED BY THE PAUL ABBOTT COMPANY
ON MAY 2, 1989

CONTINGENT LIABILITIES	
As endorser, comaker or guarantor	
On leases or contracts	$117,385
Legal claims	None
Provision for Federal Income Tax	$75,690*
Other special debt	$21,675

GENERAL INFORMATION	
Are any assets pledged?	No
Are you defendant in any suites or legal actions?	No
Have you ever taken bankruptcy	No

*Total remaining estimated payments for 1989.

SF 278 (Rev. [illegible])
U.S. Office of Personnel Management

[illegible]

Reporting Individual's Name				
Rill, James F.	**Assets and Income**	Page Number	2	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

S or DC	BLOCK A Assets & Income Sources Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	BLOCK B Valuation of Assets Category of Value (X) None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	BLOCK C Income Type of Income (X) Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	Category of Amount of Income (X) None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	BLOCK D Transactions Test If yes, complete Schd. B Part I for these assets including those sold for a loss. YES	NO
Example	X Y Z Common				x				x									x						—		x	
Example	Doe Jones & Smith, Hometown, USA			x											ptnrshp income									$40,000			
1	Collier, Shannon, Rill & Scott, Washington, DC					X KCK									Ptnrshp Income								X	$137,527 (1987) $404,630 (1988)	[illegible] 5-5-89 KCK		
2	Marshall Durbin Food Corp Birmingham, AL														Director's Fee			X						$ 2,000			
3	McGraw-Hill, Inc. Hightstown, NJ (chapter of book written for publication ed. Carla Hills) KCK														Royalty		X							$ 180.37			
4	Marriott Corporation Washington, DC				X				X								X										
5	Alex Brown & Sons, Inc. Baltimore, MD (cash reserve fund) KCK			X					X									X									
6	Maryland Nat'l Corp. Baltimore, MD (stock) KCK					X			X									X									
7	T. Rowe Price Prime Reserve Fund KCK Boston, MA			X					X										X								
8	Equitable Assur. Soc Charlotte, NC (life ins. policy) KCK			X							X						X										
9	Perpetual American Alexandria, VA (CD) KCK		X								X							X									
10	Am. Security Bank (Checking)			X							X							X									

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Reporting Individual's Name: Rill, James P.

Assets and Income

Page Number 3 | Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employment, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA accounts, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

	BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets							BLOCK C Income																BLOCK D Transactions Test	
	Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)							Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)								Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for those assets including those sold for a loss.	
S or DC		None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
Example	XYZ Common				x				x									x								x	
	Doe Jones & Smith, Hometown, USA			x											ptnrshp income									$60,000			
11	Am. Security Bank (MM)						X				X									X KCK							
12	Am. Security Bank (IRA) (no personal direction) KCK			X					~~X~~ KCK		X corrected 5-30-89 KCK							X KCK									
13	Sun Life Ins.; life insurance policies		X								X						X										
14	Chicago Pacific Common Stock (being converted to Maytag)		X						X							X											
15	Keogh account (Collier, Shannon Retirement Plan for Partners) - administered by Riggs Bank - Collier Shannon Retirement Plan for Partners is part of Riggs Liquid Assets Fund (Total value of fund was $91.2 million on 5-31-89) KCK							X	X												X						

SEE ATTACHMENT FOR INDIVIDUAL ASSETS OF RIGGS LIQUID ASSETS FUND KCK

SF 278 (Rev. 1/83)
FPM Chapter 735
U.S. Office of Personnel Management

Form Approved
OMB No. [illegible]

Reporting Individual's Name	Rill, James F.

Page Number	4	Schedule B		

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☒ Y. A. KCK

S or DC		Identification of Assets	Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	$1,001-$5,000	$5,001-$15,000	[illegible]	[illegible]	$100,001-$250,000	Over $250,000
	Example	X Y Z Common	X			2/1/83			X			
1												
2												
3												
4												
5												
6												

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. Exclude transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), exclude gifts from relatives and exclude gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☒ .A. KCK

S		Source (Name and Address)	Brief Description	Value
	Example	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/83	$600
		Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1				
2				
3				
4				
5				
6				

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SF 278 (Rev. 1/87)
FPM Chapter 735
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name
Rill, James F.

Page Number	5	Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☒

		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Example	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	25 yrs			X		
		John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1		None									
2											
3											
4											
5											
6											

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

	Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Hometown, USA	7/78 pinership agmnt
	Pursuant to partnership agreement, filer will receive return of capital account and amounts owed to him for fees not yet received. (no contingencies are included.) KCK Filer will retain his interest in law firm's Keogh retirement plan (Collier, Shannon Retirement Plan for Partners). KCK	Collier, Shannon, Rill & Scott Washington, DC	9/87

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278-109

SF 278 (Rev. 1/87)
FPM Chapter 735
U.S. Office of Personnel Management

Form Approved
OMB No. [illegible]

Reporting Individual's Name	Rill, James F.
Page Number	6
Schedule	D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. **Exclude** positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non profit education	President	6/82	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/76	11/83
	Collier, Shannon, Rill & Scott Washington, DC	Law firm	Partner	1963	Present
	Marshall Durbin Food Corporation (will resign upon confirmation) KCK Birmingham, AL	Business Enterprise	Director	9/73	Present
	The Winston Group, Inc. Lanham, MD	Catering Business	Director	1/76	10/88
	Bureau of National Affairs (will resign upon confirmation) KCK Washington, DC	Specialized Information-Gathering Organ./Publication	Member of Advisory Bd of A/T & Trade Reg. Report	3/70	Present
	The Bullis School Potomac, MD	Non-Profit Education	Board of Trustees	7/78	Present

Part II
Compensation In Excess Of $5000
Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, USA	Legal services
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction
	R.J. Reynolds Winston-Salem, NC	Legal Services
	Conagra Corporation Washington, DC	Legal Services
	Food Marketing Institute Washington, DC	Legal Services
	Great Lakes Chemical Corp. West Lafayette, IN	Legal Services
	American Frozen Food Institute McLean, VA	Legal Services
	Cyclops Corp. Pittsburgh, PA	Legal Services

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Rill, James F.
Schedule D, Part II (Compensation in Excess of $5,000 Paid by One Source)

FINANCIAL DISCLOSURE REPORT

Source	Brief Description of Duties
Albertson's Inc. Boise, Idaho	Legal Services
Pepsico, Inc. Purchase, NY	Legal Services
American Meat Institute Arlington, VA	Legal Services
Detroit Auto Dealers Association Birmingham, MI	Legal Services
Society of Ind. Gas Mktrs of America Washington, DC	Legal Services
Tyson Foods Inc. Springdale, AR	Legal Services
Winn-Dixie Stores, Inc Jacksonville, FL	Legal Services
National Broiler Council McLean, VA	Legal Services
Perdue Farms, Inc. Salisbury, MD	Legal Services
Safeway Stores, Inc. Oakland, CA	Legal Services
Thomson Consumer Electronics, Inc. Indianapolis, IN	Legal Services
Actmedia, Inc. Darien, CT	Legal Services

Rill, James F.
Schedule D, Part II (Compensation In Excess of $5,000 Paid by One Source)

FINANCIAL DISCLOSURE REPORT

Source	Brief Description of Duties
Interco, Inc. St. Louis, MO	Legal Services
Murray Ohio Manufacutring Company Brentwood, TN	Legal Services
National Association of Convenience Stores Alexandria, VA	Legal Services
Getty Petroleum Corporation Plainview, NY	Legal Services
Allegheny Ludlum Steel Corp. Pittsburgh, PA	Legal Services
Outdoor Power Equipment Institute Alexandria, VA	Legal Services
American Stores Company Salt Lake City, Utah	Legal Services
Smokeless Tobacco Council Greenwich, CT	Legal Services
Snack Food Association Alexandria, VA	Legal Services
Kasco, Inc. Temple Hill, MD	Legal Services
American Super Stores Inc. Wilmington, DL	Legal Services
Shaws Supermarket East Bridgewater, MA	Legal Services

Rill, James F.
Schedule D, Part II (Compensation In Excess of $5,000 Paid by One Source)

FINANCIAL DISCLOSURE REPORT

Source	Brief Description of Duties
Kuboda Tractor Company Compton, CA	Legal Services
Planters-Life Savers Co. Winston-Salem, NC	Legal Services
Shipbuilders Council of America Washington, DC	Legal Services
National Association of Mutual Insurance Companies Indianapolis, IN	Legal Services
Briggs & Stratton Corporation Wauwatosa, WI	Legal Services
Bethlehem Steel Corporation Bethlehem, PA	Legal Services
FMC Corporation Chicago, IL	Legal Services
Western Union Telegraph Co. Upper Saddle River, NJ	Legal Services
Revlon Inc. New York, NY	Legal Services
Council of Fleet Specialist Overland Park, Kansas	Legal Services
Korman Jackson & Krantz Cleveland, OH	Legal Services
Roscoe Moss Co. Los Angeles, CA	Legal Services

Rill, James F.
Schedule D, Part II (Compensation In Excess of $5,000 Paid by One Source)

FINANCIAL DISCLOSURE REPORT

Source	Brief Description of Duties
Invacare Corporation Elyria, OH	Legal Services
Borg Warner Chicago, IL	Legal Services
International Paper Company Memphis, TN	Legal Services

COLLIER, SHANNON, RILL & SCOTT
RETIREMENT PLAN FOR PARTNERS

PERSONAL STATEMENT FOR JAMES F. RILL
AS OF DECEMBER [illegible], 1988

	FIXED ACCOUNT	EQUITY ACCOUNT	LOANS
BALANCE 1/1/88	312,515.45	0	0
1988 CONTRIBUTION	30,000.00	0	0
PLAN EARNINGS	21,809.23	0	0
TOTAL ADDITIONS	51,809.23	0	0
BALANCE 12/31/88	364,324.68	0	0
VESTED PERCENT	100%	100%	100%
VESTED AMOUNT	364,324.68	0	0
TOTAL ACCOUNT BALANCE	364,324.68		

OUR RECORDS INDICATE YOUR:
(1) DATE OF BIRTH IS 3/4/33
(2) DATE OF HIRE IS 1/1/59
(3) NORMAL RETIREMENT DATE IS 4/1/1998

PREPARED BY THE PAUL ABBOTT COMPANY
ON MAY 2, 1989

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS	
Cash on hand in banks	
American Security Bank:	
Checking	$9,792
Moneymarket	$106,478
U.S. govt securities	None
Listed securities	
MNC Financial Common Stock	
1,215 shares	$59,838
Chicago Pacific/Maytag Common Stock	
112 shares	$2,632
Marriott Corporation Common Stock	
510 shares	$18,423
Unlisted securities	
500 shares Marshall Durbin Food Corp. approx current book value	$12,800
Accounts and notes receivable:	
Due from relatives and friends:	None
Due from others	None
Doubtful	
Winston Grp note	$25,000
Real estate owned	$650,000
Real estate mortgages receivable	None
Autos and other personal property	$152,525
Cash value-life insurance	$8,907
Other assets--itemize:	
Alex Brown & Sons Moneymarket	$15,776
T. Rowe Price Moneymarket	$77,951
Perpetual Am. CD	$21,868
AT&T Bond	$1,000
IRA	$12,286
Retirement (Keogh) Plan	$364,324
Total Assets	$1,539,600

LIABILITIES	
Notes payable to banks-secured	None
Notes payable to banks-unsecured	None
Accounts and bills due	$5,065
Unpaid income tax	None
Other unpaid tax and interest	None
Real estate mortgages payable	$11,967
Chattal mortgages and other liens payable	None
Other debts--itemize	
Car loans	$12,383 $6,066
Total liabilities	$35,481
Net worth	$1,539,600
Total liabilities and net worth	$1,575,081

CONTINGENT LIABILITIES

As endorser, comaker or guarantor	
On leases or contracts	$117,385
Legal claims	None
Provision for Federal Income Tax	$75,690*
Other special debt	$21,675

*Total remaining estimated payments for 1989.

GENERAL INFORMATION

Are any assets pledged?	No
Are you defendant in any suites or legal actions?	No
Have you ever taken bankruptcy	No

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR NONJUDICIAL NOMINEES

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   Collier, Shannon, Rill & Scott authorizes participation by its lawyers in pro bono activities during regular firm hours. I have represented two indigents in court-appointed criminal matters.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - - through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

   No. As indicated in response to Question I-10, I am a member of the Metropolitan Club, Washington, D.C. The Club in June, 1988 amended its Bylaws to make clear that women were eligible for membership. I was and am in favor of that amendment.

AFFIDAVIT

I, ______________________________, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

May 30, 1989	JAMES FRANKLIN RILL
(DATE)	(NAME)

Sandra L. Lake 8/30/90
(NOTARY)
Washington, D.C

CONFIRMATION HEARING ON RICHARD B. STEWART

WEDNESDAY, JULY 26, 1989

U.S. SENATE,
COMMITTEE OF THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 12:10 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin, presiding.

Also present: Senators Thurmond and Grassley.

Senator HEFLIN. The hearing will come to order. Senator Kennedy is on his way to introduce you, but introductions do not necessarily have to be at the beginning because his remarks do not necessarily have to be as a formality. But we are delighted to have Mr. Richard B. Stewart, who has been nominated for the U.S. Assistant Attorney General for Land and Natural Resources Division, here.

And I have an opening statement, but I will make that a part of the record, and we are delighted to see you.

[Statement of Senator Heflin follows:]

STATEMENT OF SENATOR HOWELL HEFLIN
ON
THE NOMINATION OF RICHARD B. STEWART
TO BE THE UNITED STATES ASSISTANT ATTORNEY GENERAL
FOR THE LAND AND NATURAL RESOURCES DIVISION
SENATE JUDICIARY COMMITTEE
JULY 26, 1989

TODAY THE SENATE JUDICIARY COMMITTEE WILL CONSIDER THE NOMINATION OF RICHARD B. STEWART FOR THE POSITION OF UNITED STATES ASSISTANT ATTORNEY GENERAL FOR THE LAND AND NATURAL RESOURCES DIVISION.

THE LAND AND NATURAL RESOURCES DIVISION REPRESENTS THE UNITED STATES IN LITIGATION INVOLVING PUBLIC LANDS AND NATURAL RESOURCES, ENVIRONMENTAL QUALITY, INDIAN LANDS AND CLAIMS, AND WILDLIFE RESOURCES. THE FASTEST GROWING AREA OF RESPONSIBILITY IN THIS DIVISION INVOLVES CIVIL AND CRIMINAL ENFORCEMENT OF ENVIRONMENTAL STATUTES. ALTHOUGH THE CASES FILED BY THE DIVISION IN THE AREA OF HAZARDOUS CHEMICAL WASTES ARE THE MOST VISIBLE AND COMPLEX, ENFORCEMENT OF THE CLEAN AIR AND WATER LAWS IS ALSO A PROMINENT PART OF THE DOCKET.

MR. STEWART HAS A PARTICULARLY DISTINGUISHED BACKGROUND. HE RECEIVED HONORS DEGREES FROM YALE, OXFORD AND HARVARD LAW SCHOOL, WHERE HE WAS EDITOR OF THE HARVARD LAW REVIEW. HE CLERKED FOR SUPREME COURT JUSTICE POTTER STEWART, AND LATER BECAME A PROFESSOR AT HARVARD LAW SCHOOL WHERE HE HAS BEEN SO

EMPLOYED SINCE THAT TIME. MR. STEWART IS DESCRIBED AS AN ENVIRONMENTAL EXPERT, HAVING WRITTEN EXTENSIVELY ON THE SUBJECT. HE IS ALSO SAID TO HAVE GREAT INTELLECTUAL CAPABILITIES.

NO ONE QUESTIONS MR. STEWART'S QUALIFICATIONS, BUT THE CONFIRMATION PROCESS REALISTICALLY ACCORDS US THE ONLY OPPORTUNITY TO UNDERSTAND HOW HE PERCEIVES THE ROLE OF ASSISTANT ATTORNEY GENERAL FOR THE LAND AND NATURAL RESOURCES DIVISION. MR. STEWART, I CONGRATULATE YOU ON YOUR NOMINATION, AND, IF CONFIRMED BY THE SENATE, I WISH YOU THE BEST OF LUCK AS ASSISTANT ATTORNEY GENERAL.

Senator **Heflin**. Do you have an opening statement, Senator Grassley?

Senator **Grassley**. I do not have an opening statement, but I do have some questions that I am going to submit for an answer in writing, and they do not need to be answered, Mr. Chairman, before his name would come before the full committee, but I would like to have them before he is considered on the floor of the Senate. So in no way am I holding up the nomination. In fact, I support the nomination, and in fact, I hope that we get a chance to vote Mr. Stewart out of our committee tomorrow. But I will leave these questions for the record.

Senator **Heflin**. Senator Thurmond.

Senator **Thurmond**. Mr. Chairman, I understood this was a full committee meeting?

Senator **Heflin**. Yes, sir, we are now full committee.

Senator **Thurmond**. I understand.

Senator **Heflin**. I am presiding.

Senator **Thurmond**. Mr. Chairman, this morning we begin the confirmation hearing of Professor Richard——

Senator **Heflin**. Pardon me. I should have called on Senator Thurmond first since we are full committee.

Senator **Thurmond**. That is all right. I do not care anything about that. I just wanted to clarify that.

Senator **Heflin**. Go ahead. Do you all want to swap places?

Senator **Grassley**. Do you want——

Senator **Thurmond**. It does not make a bit of difference. OK. I just wanted to clarify. It is the full committee; is that right?

Senator **Heflin**. That is right.

Senator **Thurmond**. This is the confirmation hearing for Professor Richard Burleson Stewart to be Assistant Attorney General.

Senator **Heflin**. Senator Thurmond, if we could interrupt. Senator Kennedy is here to introduce Mr. Stewart, and we will let him go ahead and then we will come back.

Senator **Thurmond**. All right. I will be glad to stop and accommodate the distinguished Senator from Massachusetts.

Senator **Kennedy**. Thank you very much, Mr. Chairman. I am delighted to have the opportunity to present to this committee Prof. Richard Stewart who has been nominated by the President for Assistant Attorney General for Land and Natural Resources Division. Richard Stewart's history and career has been one which has demonstrated a career of excellence.

The only part of his whole career that I have ever questioned was his choice of going to Yale before he went to Harvard Law School. Both universities he made an outstanding record, selected as a Rhodes Scholar, worked with indigents while he was going through the Harvard Law School, editor of the Harvard Law Review, had an important public contribution as a clerk for the Supreme Court Justice Potter Stewart. He has in the course of his career been a scholar-in-residence at EPA. He has been head of the Litigation Division for Environmental Defense Fund.

The President of the United States said during the course of his campaign that he wanted to be the environmental President. I think with the strong advice and counsel and guidance that this nominee can give to the administration, I think that that opportunity and that realization would be advanced.

He has been a professor for some 17 years, been the author of four books, some 33 different articles on administrative law and environmental issues, and he is superbly well qualified for this position, and I would certainly urge this committee to give favorable consideration to this nomination.

Senator HEFLIN. Thank you, Senator Kennedy. We will not hold it against him that he went to an Ivy League school.

Senator KENNEDY. Thank you very much.

[The statement of Senator Kennedy follows:]

REMARKS OF SENATOR EDWARD M. KENNEDY
HEARING ON THE NOMINATION OF RICHARD B. STEWART TO BE ASSISTANT ATTORNEY GENERAL FOR THE LAND AND NATURAL RESOURCES DIVISION
JULY 26, 1989

Thank you, Mr. Chairman, for conducting this hearing.

I wish to introduce to the Judiciary Committee Richard B. Stewart, who has been nominated by the President to serve as Assistant Attorney General for the Land and Natural Resources Division. Mr. Stewart is a distinguished resident of the Commonwealth of Massachusetts, and he is currently Professor of Law at Harvard Law School in Cambridge. I am pleased to support his nomination to this very important position.

Throughout his career, the nominee has demonstrated great intelligence and professional excellence. In 1971, he joined the faculty at Harvard, where he has become one of the nation's leading experts on administrative law and on environmental law, publishing four books and thirty-three articles in the past eighteen years.

During that period, Professor Stewart has also demonstrated an impressive dedication to preserving the environment. He served as scholar-in-residence at the Environmental Protection Agency, and for twelve years he served as a trustee and member of the litigation committee of the Environmental Defense Fund. I am confident that he will bring outstanding legal skill and a strong commitment to protecting our environment to his new position.

President Bush has expressed his desire to be the "Environmental" President. Dick Stewart is well qualified to help the President achieve that goal, and I commend him to the members of our Committee.

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Senator HEFLIN. Senator Thurmond, would you go ahead.

Senator THURMOND. I just want to say this morning we begin the confirmation hearing of Prof. Richard Burleson Stewart to be Assistant Attorney General for the Land and Natural Resources Division of the Department of Justice.

I first want to welcome you, Professor Stewart, and to extend my congratulations on your nomination. Mr. Chairman, Professor Stewart has an outstanding academic background. He graduated summa cum laude in 1961 from Yale University where he received his bachelor's degree. From 1961 to 1963 he was a Rhodes Scholar at Oxford University and earned his master's degree with first class honors in philosophy, politics, and economics. He attended Harvard Law School where he was the editor of the Law Review, and graduated magna cum laude in 1966.

Following graduation from law school, Professor Stewart served as a law clerk to Justice Potter Stewart. He then joined the law firm of Covington and Burling where he was an associate until 1971. From 1971 until June of this year, he was a professor of law at Harvard during which time he was also a visiting professor of law at both University of Chicago Law School and University of California at Berkeley.

In 1980, he was a scholar-in-residence at the Environmental Protection Agency, and for a short time in 1974 Professor Stewart served as special counsel to the U.S. Senate Select Committee on Presidential Campaign Activities. Professor Stewart has written several books and numerous articles on environmental and administrative law, and is highly regarded as one of the leading scholars in this field.

He is a member of the environmental defense fund, American Academy of Arts and Sciences, and American Law Institute. He serves on the academic advisory committee for the Foundation for Research on Economics and the Environment, and the board of editors for the Oxford Environmental Law Journal.

Professor Stewart, you have a very distinguished background. We welcome you here, and we look forward to hearing your testimony.

Dr. STEWART. Thank you very much, Senator.

Senator HEFLIN. Mr. Stewart, if you would rise and let me give you the oath. Do you solemnly swear that the testimony that you give in this hearing will be the whole truth and nothing but the truth, so help you God?

Dr. STEWART. I do.

Senator HEFLIN. All right. Would you like to introduce members of your family or friends that are with you?

TESTIMONY OF RICHARD BURLESON STEWART, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Dr. STEWART. Well, my immediate family is still over in Europe. But my mother-in-law, Rose Fails, is here, and my sister, Elizabeth Fox, and I am delighted to see them.

Senator HEFLIN. We are delighted to have your family here. If you would, go ahead and make any opening statement that you would like to make.

Dr. STEWART. Well, I would just say I am very proud and very honored to be nominated for this position. I very much appreciate the courtesy of the committee and especially the chairman in fitting me in to a busy schedule, and I am here to answer whatever questions you have.

Senator HEFLIN. I will do like Senator Grassley and submit questions in writing and do not require that they be answered except before it comes up on a vote on the floor.

But let me ask you a few questions. Congressman Bob Wise, the chairman of the House Subcommittee on Government Information, Justice, and Agriculture, provided us with a copy of his letter to President Bush concerning your nomination. In that letter dated May 16, 1989, Congressman Wise expressed several concerns about your criticisms and disagreements with current U.S. environmental regulatory systems. Have you seen a copy of that letter?

Dr. STEWART. Yes, I have.

Senator HEFLIN. Would you like to respond to that letter?

Dr. STEWART. Yes, Mr. Chairman. It is true in my academic writings I have suggested we ought to move toward greater reliance on economic incentives to accomplish environmental cleanup more cheaply and more effectively. But that in no way, I think, implies that our existing laws should not be enforced with full vigor, and if I am confirmed I will be committed to the vigorous enforcement of existing laws, and indeed in my writings I have said that we must continue to rely on regulation. We cannot rely solely on economic incentives. That they may be most appropriate as an add on or a supplement.

And I think the President's clean air proposals and concept illustrate that. The regulatory controls will be a base, but to achieve cleanup on acid rain, we will use some economic incentives on top. So I think they can work together.

Senator HEFLIN. In other words, you intend to whatever the laws may be pertaining to environment, you intend as your function and your responsibility to vigorously enforce them?

Dr. STEWART. Absolutely.

Senator HEFLIN. All right, sir. Now there is a matter pertaining to your blind trust. Has that been worked out?

Dr. STEWART. I intend if I am confirmed to establish a qualified, diversified blind trust in accordance with the guidelines of the Office of Government Ethics to deal with any potential financial conflicts. And I intend to do that very promptly.

Senator HEFLIN. I will submit my other questions in writing. Senator Thurmond, do you have some questions?

Senator THURMOND. Just a very few, Mr. Chairman. Professor Stewart, you will be responsible for bringing both civil and criminal enforcement cases, primarily on behalf of the EPA for the control and abatement for pollution of air and water resources and the control of toxic substances and environmental hazards.

Has the record of the Division, in your opinion, been satisfactory to date, and if not, what will you do to improve enforcement procedures?

Dr. STEWART. Well, Senator, I think that the Division has compiled a strong record of effective enforcement of our environmental laws. It has got three sections specifically devoted to that task: the environmental enforcement; environmental crimes; and wildlife sections. And in the last administration and continuing into this one and every year, there has been an increase in actions brought, convictions obtained, civil fines recovered, and lawyers committed to this task. So I think it has been one of impressive growth.

That does not mean we can stand still. The President has made clear that environmental enforcement is a top priority of this administration, and that we need to strengthen further our efforts. The Congress has also passed some new environmental laws, last year some laws dealing with ocean dumping and medical wastes, for example. So I think we will need to continue to build on this record of strengthened enforcement.

Senator THURMOND. Professor Stewart, what do you consider to be the primary goals and priorities facing the Land and Natural Resources Division, and what action will you take in accomplishing these tasks if you are confirmed as Assistant Attorney General?

Dr. STEWART. Well, I think the top goal, I think, is to strengthen, continue to strengthen the enforcement effort, as I have described. Because of the urgency of our environmental problems and the new laws that Congress has passed, I think expanding our enforcement abilities will be my top priority. There are obviously a lot of other important business that the Division does. It represents, for example, Indian claims. It is the general representative of many Government agencies in litigation. And so I do not intend to neglect those areas, but I think the enforcement side of it is the priority.

Senator THURMOND. Professor Stewart, we have had a number of oilspill disasters lately that had a very detrimental effect on our environment. It may fall to your responsibility to take some action in these. I will not ask you any further details though because you may have to take some future action.

Dr. STEWART. Yes, well, as I understand it——

Senator THURMOND. I just want to call the problem to your attention.

Dr. STEWART. Yes. Well, as I understand, the Division is already very actively involved in both possible civil and criminal investigations. It is working with the Civil Division of the Justice Department, the FBI, the Coast Guard, the EPA, and U.S. Attorney's Office in Alaska, and I will certainly back any vigorous enforcement if the facts justify it.

Senator THURMOND. I have no further questions, Mr. Chairman. Again, I just want to congratulate you, Professor Stewart, and wish you well in your service.

Dr. STEWART. Thank you so much, Senator.

Senator THURMOND. And I applaud you for being willing to come to Washington and serve.

Dr. STEWART. Thank you.

Senator HEFLIN. On behalf of Chairman Biden, I am requested to ask a couple of questions. Approximately 1 year ago that the Justice Department settled a Superfund cleanup case at one of the most polluted sites in the country, the Rocky Mountain arsenal site near Denver, CO. An interesting aspect of the case is that the Justice Department was placed in a position of simultaneously acting on behalf of both the plaintiff, that being EPA, and one of the defendants, the Army. I am informed that at one point in the proceedings the judge in the case had to ask the Justice Department attorney to clarify which side of the case he was representing at the time.

Since cases of this sort are expected to become more frequent in the future, I would appreciate your comments on whether the Justice Department can adequately protect the public's health and safety under the circumstances when the Federal Government is both the prosecutor and the defendant?

Dr. STEWART. Well, I think, of course, the Justice Department is often in that position when two different other branches of the Federal Government disagree, and it is important to have a unified legal position. That is why the Justice Department is there. On the specific question of these Defense Department facilities and Energy Department facilities, it is my understanding the Division has facilitated effective agreements between EPA and Energy and Defense.

For example, the Hanford Reservation up in Washington has a very far-reaching and costly cleanup that has been agreed to, and the Division helped to negotiate that. And so I think that is an effective way to protect the environment.

Senator HEFLIN. Currently cases referred to the Justice Department from the EPA which have not yet been filed have been pending for an average of 144 days, for about 4 months. These filing dates have slowly crept up during the past few months. Some of the cases which are referred require prompt injunctive action. What action will you take as Assistant Attorney General to decrease the lag between referrals and the filing of cases by the Department?

Dr. STEWART. Well, I will certainly undertake to look into the problem of filing delays and take whatever steps in terms of management plans or resources that may be needed to ensure that they are not excessive.

Senator HEFLIN. Thank you, sir. Are there any other questions from anybody else? If not, we appreciate your being here.

[Whereupon, at 12:26 p.m., the committee adjourned, subject to the call of the Chair.]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 28, 1989

Honorable Joseph R. Biden
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the responses of Richard B. Stewart to the written questions of Senators Grassley and Heflin in connection with his nomination as Assistant Attorney General for Land and Natural Resources.

If we can be of any further assistance, please let us know.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Assistant Attorney General

Enclosure

cc: Honorable Strom Thurmond

SENATOR GRASSLEY'S QUESTIONS

You have asked me several questions relating to the Superfund Improvement Act of 1985. The answers set forth below reflect initial research on these questions and represent my preliminary views on them. I want to stress that if confirmed I will be pleased to consult with and carefully consider your views or those of other Committee members on any of these issues.

Answer to Question 1.

You have asked about my views regarding the provision in CERCLA regarding the administrative record and whether that provision should be applied retroactively. Based on my preliminary research, as well as my background as a professor of law who has both taught and written about the development of administrative law, my views, in summary fashion, are that the orderly process of developing an administrative record should be encouraged and that, on the face of the statute, the provision should probably be applied to the review of decisions taken before the 1986 amendments.

As you may recall, in Section 113(k)(1) of CERCLA, 42 U.S.C. 9613(k)(1), Congress required EPA to "establish an administrative record upon which [EPA] shall base the selection of a response action," and stipulated in Section 113(k)(2)(B) that the agency "shall promulgate regulations" in accordance with the Administrative Procedure Act which establish participatory procedures for the development of administrative records. 42 U.S.C. 9613(k)(2)(B). In recognition that it would be some time before promulgation of such regulations could be accomplished, Congress further provided in Section 113(k)(2)(C) that, until such regulations are promulgated, "the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action. The development of an administrative record and the selection of response action under this chapter shall not include an adjudicatory hearing." 42 U.S.C. 9613(k)(2)(C). The provision of SARA confirms that courts should apply customary norms of administrative law to EPA cleanup decisions taken under CERCLA/SARA. With regard to the suggestion that the Department of Justice has taken inconsistent views, my understanding is that the Department has always supported the concept of record review.

Answer to Question 2.

It is my understanding that the United States has generally not taken the position that CERCLA contribution claims cannot be brought until the United States has reduced to judgment its claim against the contribution claimants. Section 113(f)(1) of CERCLA provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable . . . during or following any civil action by the United States." It is my understanding that the United States has, accordingly, conceded that the statute permits joinder or impleader of contributors in the United States' action. It does not necessarily follow, however, that joinder is always mandatory in any and all circumstances. The legislative history cautions that the courts "should carefully manage cases filed [under Section 113(f)] to insure that the litigation is conducted in an expeditious manner and is not unduly delayed by the concurrent maintenance of third party actions." H. Rep. No. 253, 99th Cong., 1st Sess., Part I at 74 (emphasis added). Otherwise, CERCLA's objectives of insuring prompt response to environmental problems and prompt return to the Superfund of money that can be used to finance cleanups at other problem sites would be frustrated.

In keeping with the foregoing, it is my understanding that the United States generally does not oppose concurrent litigation of its claims and defendants' claims for contribution. Nevertheless, because contribution claims necessarily include issues which are irrelevant to the United States' claims (e.g., defendant and third-party defendants' proportionate share of the harm), and because these are complex issues which can require lengthy discovery and trial proceedings, the United States frequently requests that cases be structured and managed in a way that does not lead to delay of resolution of the United States' claims. On occasion, this goal can be achieved by permitting largely concurrent pretrial practice and discovery, while providing that the trial phase of the case be bifurcated pursuant to Rule 42(b) of the Federal Rules of Civil Procedure to allow the United States' claims to be resolved first.

I understand that the Distler case appears to present one of those unusual circumstances where impleader appeared inappropriate. There, as I understand the matter, in the interests of simplifying the issues in the case, the parties had fully negotiated a case plan which they were prepared to submit to the court which contemplated that contribution claims would be brought in separate, but not necessarily later, actions. Despite its commitment to the other parties in the case, one defendant sought to implead other parties for purpose of asserting contribution and indemnification claims based not on Section 113(f) of CERCLA, but rather on a contract between it and the third-parties. Because this effort came relatively late in the case (approximately eight months after the complaint was filed), was inconsistent with the case management plan negotiated by the parties, and was based on a common law contract claim, as opposed to Section 113 of CERCLA, the United States opposed impleader.

I understand that the United States' brief in Distler was not intended to reflect a change in course by the Justice Department. The Department's position has been that CERCLA provides, subject to the appropriate exercise of judicial case management consistent with the purposes of the Federal Rules of Civil Procedure, for joinder of contribution claims with the United States' claims.

Answer to Question 3.

Certainly I would not endorse "sweetheart" settlements between any parties, least of all between EPA and another federal agency. I am not aware of any evidence which leads me to believe that "sweetheart" deals have infected settlements resolving federal agencies' liabilities under Superfund.

In such settlements, the role of the Justice Department is to represent the interests of the United States. The "unitary executive" theory, cited in your question, requires that when the government speaks, it speaks with one voice. And, in the context of litigation, the duty of the Justice Department is to find that voice. The Department seeks to do that by effectuating settlements between EPA and the federal agency which is responsible for some of the waste at a Superfund site. Certainly there are disagreements within the Executive branch in working out those settlements but that is where they are resolved -- within the Executive branch -- so when the Justice Department goes into court to represent the United States, it has one client, and one view of the law.

As for the extinguishment of contribution claims against federal agencies, I presently see no reason why, in a circumstance where a federal agency has contributed to a cleanup as part of a comprehensive site settlement embodied in a judicially approved consent decree, the federal agency should not enjoy contribution protection to the same extent as a private settlor. Certainly, a state which is a settlor would be entitled to such protection.

Whether an administrative settlement between EPA and a federal agency conveys the same measure of protection against contribution claims is a closer question which I will most certainly examine in my capacity as Assistant Attorney General.

Answer to Question 4.

I have reviewed the question on settlements and contribution protection, and it seems to me -- at least at this point in my research -- that the position taken by the Department on Section 113(f) is faithful to and consistent with both the language of SARA and with the important goals of replenishing the Superfund, encouraging settlements and minimizing litigation. If confirmed, I would, of course, give careful consideration to legislative history or other evidence pointing to a contrary conclusion.

The essence of your question, as I understand it, is to ascertain which of the two general approaches to settlement and the impact on contribution rights should be followed in the

CERCLA context. The approach codified in the 18 states that have enacted the Uniform Contribution Among Tortfeasors Act is that the claims against the non-settlers are reduced only by the amount of the settlement. The approach taken in the two states that have adopted the Uniform Comparative Fault Act is that the reduction should also reflect the proportionate share of the liability of the settling party.

I understand that the Department has asserted that Section 113(f) requires that when the government settles with some liable parties, its claim against remaining liable parties is reduced only by the amount of the settlement. Section 113(f)(2) provides:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

This provision requires a reduction by the amount of the settlement, and makes no provision for further reductions based on equitable factors. It therefore supports the Department's assertion that the statute does not provide for judicial consideration of equitable factors in connection with the claims against non-settlers. Similarly, in answer to your final question, I believe that the statutory language indicates that when the government pursues non-settlers, a court should not consider equitable factors in deciding whether to hold the non-settlers liable for remaining government response costs.

I recognize that there are some differences in views among district courts; I understand that the Laskin decision represents the minority view on this issue. The recent decision in Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, Civil Action No. 83-3882, Memorandum and Order Concerning Partial Settlement (D. Mass. April 27, 1989) (copy attached) endorses the position advocated by the Department. In considering a settlement of CERCLA natural resource damage claims of the United States, the court observed that Section 113(f)(2) is a "powerful tool -- actually a carrot and a stick --placed in the hands of the EPA to obtain settlements." (p. 13). The carrot is both protecting settlers from contribution claims and allowing settlers to seek contribution themselves.

> As for the stick, if the settlor pays less than its proportionate share of liability, the non-settlors, being jointly and severally liable, must make good the difference. In this respect, the words of the statute are clear: the potential liability of the others is reduced "by the amount of the settlement," not by the

> settlor's proportionate share of any damages ultimately determined to have been caused. Id. at 14 (footnotes omitted).

Finally, I should note my understanding that most CERCLA settlements are reflected in judicial consent decrees. Section 112(d) requires that remedial action settlements be reflected in consent decrees. The Department has recognized that for a court to approve and enter a consent decree, the court needs to satisfy itself that the decree is fair and reasonable, and that it is consistent with the goals of CERCLA. In particular, the court can inquire as to whether the decree was negotiated in good faith or is in any manner collusive. Before the Department seeks entry of the decree, the Assistant Attorney General must, based on review of the settlement and any comments received during the public comment period required for all consent decrees, be satisfied that the settlement is fair and reasonable. These procedures help insure the integrity and fairness of the settlement process. I understand that since the enactment of CERCLA, the Department has successfully sought the entry of approximately 200 consent decrees, and in no case has a court refused to enter a consent decree because it was unfair or unreasonable. As Assistant Attorney General I will make sure that the settlements that I approve and the consent decrees that we seek to have entered continue to meet these high standards.

Chemical Waste Litigation Reporter
Suite 200, 1519 Connecticut Ave., N.W., Washington, D.C. 20036

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ACUSHNET RIVER) CIVIL ACTION
&) NO. 83-3882-Y
NEW BEDFORD HARBOR:) (Partially
PROCEEDINGS RE) Consolidated
ALLEGED PCB POLLUTION) Cases)

MEMORANDUM AND ORDER CONCERNING PARTIAL SETTLEMENT

YOUNG, D.J. April 27, 1989

These partially consolidated cases are presently before the Court for approval of a Partial Consent Decree (the "Proposed Decree") between the plaintiffs, the United States of America and the Commonwealth of Massachusetts (hereinafter, the "sovereigns"), and the defendant AVX Corporation ("AVX"). [1] The Proposed Decree attempts to resolve the liability of AVX for injury to natural resources allegedly caused by the release of polychlorinated biphenyls ("PCBs") during its ownership and operation of a capacitor manufacturing plant adjacent to New Bedford Harbor. The underlying action was brought, *inter alia*, under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. sec. 9607. [2] In addition, the Natural Wildlife Federation moved to intervene in the underlying action, in part to oppose the Proposed Decree.

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[1] Taken together, these partially consolidated cases constitute quintessential complex litigation. As recognized by the American Law Institute Complex Litigation Project, "in massive environmental clean-up litigation what already is a highly complex basic dispute is compounded by the complexity of deciding the applicability of insurance coverage as well as assigning liability among multiple insurers." American Law Inst., Complex Litigation Project 17 (Tent. Draft No. 1, April 14, 1989).

This memorandum continues the discussion of the pre-trial issues raised in these partially consolidated cases. It is intended to be read with the Court's earlier decisions concerning jurisdiction and parties, Acushnet River and New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 675 F. Supp. 22 (D. Mass. 1987)("Acushnet I"), the right to jury trial, Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, No. 83-3882-Y, slip op. (D. Mass. Feb. 27, 1989)("Acushnet II") and successor liability, Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, No. 83-3882-Y, slip op. (March 28, 1989)

(footnote continued)

I. The Motion of the National Wildlife Federation to Intervene

A settlement agreement of two million dollars ($2,000,000) and a proposed judgment approving the settlement was filed with this Court on March 4, 1987. Notice of the proposed settlement was published in the Federal Register on March 12, 1987. 52 Fed. Reg. 7671 (March 12, 1987). On March 27, 1987, Aerovox Incorporated ("Aerovox") moved this Court to impose conditions on its approval of the Proposed Decree and to hold an evidentiary hearing.

(*Acushnet III*").

[2] The sovereigns filed amended complaints in early 1984 to include claims for recovery of governmental response costs incurred and to be incurred, for injunctive relief under CERCLA, and for claims under other federal and state environmental statutes and state common law.

As a preliminary matter, this Court must determine whether to permit the intervention of the National Wildlife Federation (the "Federation") which seeks, inter alia, to contest the Proposed Decree. The Federation seeks to represent the interests of its members who live in the New Bedford Harbor area. The Federation initially sought intervention as of right pursuant to Fed. R. Civ. P. 24(a) and the CERCLA intervention provision, 42 U.S.C. sec. 9613(i). The Federation, setting its sights somewhat lower at the hearing on intervention, now seeks permissive intervention subject to certain conditions pursuant to Fed. R. Civ. P. 24(b). 3/ These conditions are as follows:

(1) The Federation may brief and argue the legal requirements applicable to any proposed consent decree lodged with this Court for consideration and approval.

(2) The Federation may brief and argue the appropriate measure of natural resource damages under CERCLA.

(3) The Federation may brief and argue the legal requirements for cleanup under CERCLA.

(4) The Federation may, with leave of the Court, brief and argue other legal issues in this case.

3/ Rule 24(b)(2) provides in pertinent part:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action:
>
> . . .
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication or the rights of the original parties.

(5) The Federation may take an appeal from a judgment it views as adverse on issues (1) through (4) above.

(6) The Federation may not participate in discovery, the examination of witnesses, or the taking or contesting of evidence.

Whether to grant permissive intervention is a matter left largely to the discretion of the district court. *E.g.*, *United States Postal System* v. *Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978)(observing that "[p]ermissive intervention is wholly discretionary with the trial court" whose decision "may only be disturbed for clear abuse of discretion"); 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, sec. 1923 at 512-14 (2d ed. 1986). The rule requires that the application to intervene be timely. [4] In addition, several other factors are to be considered: the nature and extent of the intervenor's interest, whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, whether the applicant will benefit by the intervention, whether the intervenor's interests are adequately represented by the other parties, and whether the intervenors will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. E.g., Brennan, 579 F.2d at 191-92; Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977); see also New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 472 (5th Cir. 1984), cert. denied, 469 U.S. 1019, 105 S. Ct. 434 (1984).

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[4] This Court observes that the timeliness inquiry considers four factors:

> 1) the length of time the applicants knew, or reasonably should have known, of their interest before they petitioned to intervene; 2) the prejudice to existing parties due to the applicant['s] failure to petition for intervention promptly; 3) the prejudice that applicants would suffer if they were not allowed to intervene; and 4) unusual circumstances militating for or against intervention[.]

Garrity v. *Gallen*, 697 F.2d 452, 455 (1st Cir. 1983)(citations omitted); *see also* *Culbreath* v. *Dukakis*, 630 F.2d 15, 20-24 (1st Cir. 1980). Obviously, there is some overlap between these factors and the factors generally listed below that are considered in granting or denying permissive intervention.

This Court holds that the application is timely. Although this suit had been filed approximately three and one-half years before the Federation sought to intervene, the Federation believed itself adequately represented by the sovereigns until the proposed settlement was announced. Without at all impugning the motives or conduct of the sovereigns, the Court notes that, upon review of that proposed settlement, the Federation apparently believed the settlement to be a betrayal. 5/ It then moved promptly to intervene. On these facts, this Court refuses to hold the application untimely as matter of law. To do otherwise would promote a sort of prophylactic intervention whereby parties would be compelled to intervene in matters simply to protect

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5/ Under the Garrity analysis, see supra note 4, this Court holds that the sudden revelation of a divergence of interests between the sovereigns and the intervenor constitutes an unusual circumstance militating for intervention.

their rights to participate in those matters downstream on the more or less remote chance that a party apparently protecting the intervenors' interests might someday betray them. Such a result would obviously be expensive and inefficient. Permitting parties like the Federation to intervene keeps the number of parties in a dispute at a minimum unless and until a real divergence of interests arises. [6]

This final point addresses another factor in the calculus: the adequacy of representation by another party. The Court holds that the sovereigns no longer adequately represent the Federation's interests in this matter. The sovereigns argue that their ultimate goal and that of the Federation are one and the same: "the restoration of the natural resources of New Bedford Harbor." Plaintiffs' Opposition to Motion of National Wildlife Federation to Intervene at 36 n.23. Thus, they argue, the differences between themselves and the Federation concern means, not ends. Id.

However, such an analysis is a triumph of formalism over reality. The differences in the measure of damages sought by the sovereigns as opposed to the Federation are substantial. The sovereigns apparently believe that "the proper measure of [natural resource] damages is the lesser of the costs of restoring or replacing the injured resources and the resources' lost use value." Plaintiffs' Reply to Brief of the National Wildlife Federation in Opposition to Proposed Partial Consent Decree at 21 (Docket #1213)(emphasis in original). The Federation asserts that the correct measure is far more sweeping: the cost of restoration or replacement of the natural resources, or failing that, of the acquisition of equivalent resources, *plus* the lost use value. Reply Brief of the National Wildlife Federation to the Parties' Opposition to NWF's Motion for Permissive Intervention Subject to Certain Conditions at 3 n.5 (Docket #1244) (emphasis added). The exact amount of money damages that the sovereigns recover, one imagines, may well have a profound impact on the ultimate quality of the Harbor. Thus, the substantial divergence of views on the proper measure of damages between the sovereigns and the Federation necessarily renders the formers' representation of the latter inadequate. [7]

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[6] The Court further notes that the putative intervenor will be prejudiced if intervention is denied to the extent that it will be unable to appeal the granting of summary judgment or the resolution of any of the legal issues on which it wishes to be heard. The prejudice to existing parties caused by intervention is addressed below.

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[7] Some of the defendants cite *Moosehead Sanitary District v. S. G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979) which established that when a party and a potential intervenor have the same ultimate goal in a litigation, a presumption of adequate representation arises and argue that therefore the Federation's motion should be denied. Opposition of AVX Corporation, et al. to Motion of National Wildlife Federation to Intervene (Docket #1216) at 15-16. There are two problems with this analysis. First, on its face *Moosehead* considered only intervention of right under Rule 24(a) and thus not the loosened standards of Rule 24(b). *Id.* at 52 n.5. Second, *Moosehead*'s requirement of the same ultimate goal is rather manipulable. In the instant case, for example, one may characterize the goals of the Federation and the sovereigns as being one and the same -- the remedying of the New Bedford Harbor's pollution -- or as divergent -- respectively, the restoration of the Harbor's natural resources along with payment for their lost use value versus the recovery of the
(footnote continued)

By permitting intervention in this matter, this Court assuredly will promote the just and equitable adjudication of the legal questions before it. Although the conditions the Federation voluntarily places on its intervention prevent it from contributing to the factual development of this case, its legal arguments will undoubtedly round out the considerations before this Court as the above discussion regarding the measure of damages makes clear.

Moreover, intervention will not cause undue prejudice or delay to the present parties. Analysis of this factor generally focuses on how the untimely entry of an intervenor into the fray may undo the work the parties have already done. With respect to future settlements or future consideration of the appropriate measure of natural resource damages or the legal requirements for cleanup under CERCLA, the Federation's participation in the process cannot undo any such work. No potential settlements are very far advanced as far as this Court knows. Further, the cleanup and natural resource damages issues remain unresolved and thus another view of the law will merely sharpen the debate, not reopen or delay matters. With respect to the Proposed Decree, as a

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lesser amount of the restoration of the resources or the lost use value. Given the realities of this litigation -- specifically the substantial difference in possible recoveries under these two theories of damages -- for the purposes of permissive intervention, this Court holds that there is significant adversity of interests between the sovereigns and the Federation. For the same reason, this Court holds that the Federation satisfies even the heightened showing required by United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 1982) to show inadequacy of the government's representation of the public interest.

practical matter the Court has already heard and read the Federation's argument. Thus, its input is already part of the calculus and any prejudice or delay from such arguments has already occurred.

True, the right to appeal that the Federation gains by intervention obviously increases the likelihood that any settlement approved by this Court will in fact be appealed. Several considerations, however, mitigate any ill effects of such a possibility. First, should the decree presently before the Court be approved, any appeal would appear to be interlocutory and thus must attend the end of AVX's participation in the case. The two million dollar settlement is to be paid to the sovereigns promptly after approval of the decree and thus the threat of an appeal by the Federation will not delay the money reaching the sovereigns' coffers. Even more signifiantly, no restoration or replacement of natural resources can begin until after the cleanup is finished. Far from having even begun yet, the cleanup awaits completion of studies by the sovereigns that will determine the most efficacious manner of proceeding. Thus, for aught this Court can see, none of the settlement money will be spent for years to come in any event.

Admittedly, should the Court of Appeals at some point vacate the instant settlement as improvidently approved, considerable time, effort, and money of the sovereigns and AVX will have been wasted. This Court, however, is still disposed to grant intervention. First, the Court observes with respect and diffidence that, given the broad discretion granted to trial courts to approve such settlements, the risk of reversal on this point seems acceptable in light of the benefits that settlement will confer on these parties. Second, this one settlement constitutes a relatively small part of this entire litigation and the nature of the intervention that the Federation seeks -- the right to argue and to appeal with respect to settlements as well as the issues of cleanup and natural resource damages -- is quite limited. Viewing the matter in the context of this entire massive litigation, the possible undue prejudice that may result to the existing parties discounted by the probability that such prejudice will ever occur is insufficient to offset the strong arguments for permitting intervention.

One further reason exists to allow intervention. Without intending any criticism of the sovereigns' advocacy, such intervention permits another voice and set of concerns to participate in the resolution of an extremely complex matter, both factually and legally -- that necessarily is taking this Court and these parties into the heretofore largely uncharted waters of a relatively new statute. The further guidance of an additional entity, especially one with some expertise in the subject at hand, is therefore not lightly to be shunned. Indeed, as the balance of this opinion will reveal, the Federation's impact in shaping this litigation cannot be denied.

For these reasons, the Court GRANTS the Federation's motion to intervene permissively, subject to the conditions listed above.[8] One further restriction is imposed which, the Court observes, is more a clarification in line with the Federation's intent than a substantive condition. The Federation may not argue to the jury the conclusions to be drawn from any evidence taken at trial or otherwise address any jury impaneled in this matter.

II. The Proposed Decree

A. The Non-Settlors' Motion.

In October, 1986, Congress passed the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499, sec. 101 *et seq.*, 100 Stat. 1613 (1986) ("SARA") amending CERCLA. Among the numerous changes it wrought in CERCLA, SARA added provisions covering settlements of CERCLA claims and, in particular, the question of contribution.[9] Included was a provision that, for the first time, granted settlors protection from contribution liability to non-settlors. The complete provision, 42 U.S.C. sec. 9613(f)(2), provides:

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[8] The First Circuit's recent decision in *United States v. Metropolitan Dist. Comm'n*, 865 F.2d 2 (1989), cited by the sovereigns, does not require a different result. There, the court affirmed the district court's decision to deny intervention by a public interest group and several towns contiguous to Massachusetts Bay in a Federal Water Pollution Control Act case. The court specifically found that the trial judge did not abuse his broad discretion by denying intervention on the liability issue. The trial court denied intervention because, *inter alia*, such intervention was untimely. The district court noted that the putative intervenors' interest in the litigation was apparent arguably as far back as June, 1985, *United States v. Metropolitan Dist. Comm'n*, 679 F. Supp. 1154, 1161 (D. Mass. 1988), yet they did not seek intervention until October, 1987, more than two years later. (The Federation represents, and no party disputes, that, although the district court opinion in *Metropolitan Dist. Comm'n* is silent on the matter, the trial court docket reveals intevention was not sought until October, 1987.) Unlike the instant case, those intervenors' motions clearly were untimely.

> Settlement. -- A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Congress passed this provision to encourage settlement of CERCLA cases. Previously, settlors had no statutory assurance that any settlement that they reached with the EPA would end their liability in a case because non-settlors might later seek contribution from them. In an attempt to offset this disincentive to settle, the Environmental Protection Agency ("EPA") adopted a policy of reducing its judgment against non-settlors to the extent necessary to extinguish the settlor's liability to the non-settlors. *See*

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[9] The doctrine of contribution allows a settlor who has paid all or a portion of a judgment to seek contribution from other jointly and severally liable parties. At common law, a settlement by the plaintiff with one or more joint tortfeasors does not release the settling defendants from contribution. The common law rule discourages the settlement of cases because the defendant settlor remains potentially liable for contribution. The Uniform Contribution Among Joint Tortfeasors Act, sec. 4, 12 U.L.A. 63 (1975), and most state statutes, including that of Massachusetts, release the settlor from liability for contribution. *See*, *e.g.*, Mass. Gen. Laws ch. 231B, sec. 4.

50 Fed. Reg. 5034, 5039 (Feb. 5, 1985). SARA's contribution provision eliminates the need for such a policy where the settlement is "administrative or judicially approved." [10]

The result is a powerful tool -- actually a carrot and a stick -- placed in the hands of the EPA to obtain settlements. The carrot the EPA can offer potential settlors is that they need no longer fear that a later contribution action by a non-settlor will compel them to pay still more money to extinguish their liability. In addition to this protection, settlors themselves are enabled to seek contribution against non-settlors. 42 U.S.C. sec. 9613(f)(3)(B) As for the stick, if the settlor pays less than its proportionate share of liability, the non-settlors, being jointly and severally liable, [11] must make good the difference. In this respect, the words of the statute are clear: the potential liability of the others is reduced "by the amount of settlement," not by the settlor's proportionate share of any damages ultimately determined to have been caused. [12]

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[10] Aerovox asserts that SARA's addition of subsection 113(f)(2) to CERCLA was not intended to change the EPA's settlement policy, but is simply another protection mechanism for achieving the fair and reasonable apportionment of damages among joint tortfeasors. This Court disagrees. The EPA's policy is best understood as a proper attempt by an agency to fill in the interstices of an incomplete statutory framework that was supplanted by a later clear directive from Congress. That clear directive necessarily trumps the old EPA policy.

Admittedly, the few decided cases do not clearly point this way. The court in City of New York v. Exxon Corp., 697 F. Supp. 677 (S.D.N.Y. 1988) seems to have discussed but not to have decided the significance of subsection 113(f)(2). The court noted that "section 113(f)(2) apparently compels the non-settlers to absorb the shortfall" between the settlement and the settlor's proportional share. 697 F. Supp. at 681 n.5. Elsewhere, the court acknowledged that some other courts have applied the Uniform Comparative Fault Act (essentially the EPA's pre-SARA policy) to post-SARA settlements. 697 F. Supp. at 683 n.9. These latter cases are indeed puzzling to this Court in that they fail even to discuss the language of subsection 113(f)(2). Lyncott Corp. v. Chem. Waste Management, Inc., 690 F. Supp. 1409, 1418 (E.D. Pa. 1988)(adopting the Uniform Comparative Fault Act approach in a cleanup settlement); Edward Hines Lumber Co. v. Vulcan Materials Co., No. 85 C 1142, 1987 WL 27368 (N.D. Ill. 1987)(adopting a similar rule in a cleanup settlement).

Finding these cases unpersuasive, this Court chooses to follow the plain language of the statute and holds that subsection 113(f)(2) of SARA has supplanted the EPA's prior policy.

This result is in keeping with Congress' intent to encourage CERCLA settlements and reduce the time and expense of enforcement litigation that necessarily diverts money from cleanup and restoration. [13] Were the law otherwise, the responsibility of a settlor for damages would need to be fully litigated by the sovereigns and the non-settlors to determine the settlor's proportional share, thus largely duplicating the aspects -- and expense -- of the litigation the settlement was designed to avoid.[14]

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[11] The parties do not dispute, and it is generally the case, that CERCLA defendants are jointly and severally liable. Indeed, the concept of contribution only makes sense in a context of joint and several liability. See, e.g., United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983); Garber, Federal Common Law of Contribution Under the 1986 CERCLA Amendments, 14 Ecology L. Q. 365, 368-69 (1987) (gathering cases). Exceptions to this rule have been made where a violator's actions have had a de minimis effect and where apportionment is readily accomplished, for example where the harms caused are distinct or are otherwise capable of a reasonable and rational division. See Garber, supra, at 368-69 & n.32.

[12] Massachusetts law yields the same result. See Mass. Gen. Laws ch. 231B, sec. 4.

[13] See City of New York, 697 F. Supp. at 693 (noting that the SARA amendments were intended to "'expedite effective remedial actions and minimize litigation'")(quoting 42 U.S.C. sec. 9622(a)); 132 Cong. Rec. H9564 (daily ed. Oct. 8, 1986) (statement of Rep. Lent)("I am pleased to report that the idea of encouraging settlements is no longer considered ground breaking but now is a simple and obvious matter of good policy. Costly protracted litigation threatens the effectiveness of the Superfund Program and consumes resources

(footnote continued)

The two non-settlors opposing the Proposed Decree -- Aerovox and Belleville Industries, Inc. ("Belleville") -- argue correctly that, for AVX to gain contribution protection, this Court must approve the settlement pursuant to 42 U.S.C. sec. 9613(f)(2). Before approving such a settlement, this Court must ascertain "that it is fair, adequate, and reasonable, and consistent with the Constitution and the mandate of Congress." City of New York, 697 F. Supp. at 692

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better spent on cleanup.")*; Gerber, 14 Ecology L. Q. at 373-74; Note, Superfund Settlements: The Failed Promise of the 1986 Amendments, 74 Va. L. Rev. 123, 124-26, 135 (1988).

[14] Were the law otherwise, the sovereigns would be involved in litigating the exact share of each of the settlors for the overall liability in order to determine the remaining amount to be recovered from the non-settlors, surely a dauntingly difficult, expensive and time-consuming task. It thus might cost the sovereigns more to settle with one party than not to settle since, if the sovereigns do not settle, they can merely prove that all five defendants here polluted and seek recovery from all or any one of them in any proportion the sovereigns choose because the defendants in such a case are generally jointly and severally liable. Admittedly, the non-settlors may bring contribution actions against each other no matter how this provision is interpreted. But the sovereigns need not be party to such litigation under this Court's interpretation of the statute, thus fulfilling Congress' intention to encourage settlement, to save the sovereigns' litigation expenses, and to keep the cost of pollution on the potentially responsible parties.

(citation omitted); *see also* *United States* v. *Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337 (S.D. Ind. 1982) (pre-SARA CERCLA case).

A multiplicity of factors are considered in evaluating whether the Proposed Decree before this Court is fair and reasonable. The protection of the public interest is paramount. *Seymour Recycling Corp.*, 554 F. Supp. at 1337. Among the other factors a district court should consider in measuring the fairness and reasonableness of a settlement are:

> a comparison of the strengths of plaintiffs' case versus the amount of the settlement offer; the likely complexity, length, and expense of the litigation; the amount of opposition to the settlement among affected parties; the opinion of competent counsel; and, the stage of the proceedings and the amount of discovery already undertaken at the time of the settlement.

E.E.O.C. v. *Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985)(citations omitted), *cert. denied*, 478 U.S. 1004 (1986); *see also* *City of New York*, 697 F. Supp. at 692 (employing a similar list of factors).

The district court's opinion in *City of New York* provides additional helpful guidance:

> In assessing [the above factors], however, the Court's role is not unlimited. Settlements are to be encouraged and the court does not "have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *Grinnell*, 495 F.2d at 456. And "where there has been arms length bargaining among the parties [and] sufficient discovery has taken place to enable . . . counsel to evaluate accurately the strengths and weaknesses of the plaintiff's case . . . there is a presumption in favor of the settlement," *Wellman* v. *Dickinson*, 497 F. Supp.

> 824, 830 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 163 (2d Cir. 1981), particularly where "a government agency committed to the protection of the public interest" has participated in and endorsed the agreement. *Id.*[;][*cf.* *Federal Trade Comm'n* v. *Standard Financial Mgt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987)(holding that the trial court "should accord some substantial deference to [an] agency's determination that [a] settlement is appropriate" in a deceptive trade practices case) (citation omitted).] Finally, in addition to the general federal policy favoring settlements, *see* *Florida Trailer & Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960), the reviewing court must be mindful that Congress, in enacting the 1986 amendments to CERCLA sought to "expedite effective remedial actions and minimize litigation." Section 122(a).
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> The balance to be struck between the policies favoring settlements and the need to safeguard the public interest in cases of this type was best summarized in *United States* v. *Carrols Development Corp.*, 454 F. Supp. 1215 (N.D.N.Y. 1978):
>
>> It is not the Court's function to determine whether this is the best possible settlement that could have been obtained but rather the Court's duty is to determine "whether the settlement is within the reaches of the public interest." *Id.* at 1222 (quoting *United States* v. *Gillette Company*, 406 F. Supp. 713, 716 [D. Mass. 1975]).

697 F. Supp. at 692-93.

An analysis of all the above factors reveals that Aerovox and Belleville have failed to overcome the material in the record that favors approving this settlement. With respect to the mandate of Congress, the various discernable intentions of Congress can be gleaned from the cases, statutory language, and legislative history. First, that body adopted CERCLA to provide the government with the authority and mechanisms to combat hazardous substance spills, leaks, and other releases. Hazardous waste disposal poses a serious and increasing threat to the environment. Congress realized that it was imperative "that the Federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal." Dedham Water Co. v. Cumberland Farms Dairy Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)(citing United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

CERCLA was designed "to protect and preserve public health and the environment." Dedham Water, 805 F.2d at 1081. That Congressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation. Without question, Congress passed the SARA amendments to encourage settlements for this very reason. 15/ Indeed, subsection 113(f), as well as section 122, both added to CERCLA by the SARA amendments, are devoted to facilitating just such arrangements.

Second, as noted above, the contribution protection provision in CERCLA subsection 113(f)(2) encourages settlement by preventing non-settlors from seeking contribution from settlors. This Court is obligated to interpret the contribution provisions of CERCLA to avoid frustration of the Act's remedial purpose. United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985). An evaluation of the Proposed Decree which overemphasizes the importance of its potential

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15/ See supra note 13.

effect on the non-settlors, which Aerovox and Belleville appear to advocate, would frustrate the statute's goal of promoting expeditious resolution of harmful environmental conditions. This Court, therefore, holds that in measuring whether the Proposed Decree is fair, reasonable, and protective of the public interest the effect on the non-settlors is not determinative, but is merely one factor in the calculus. Such an interpretation of subsection 113(f)(2) promotes the intent of Congress by giving the federal government a powerful tool necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.

Third, the Proposed Decree between the sovereigns and AVX is consistent with the mandate of Congress. The Court's review of the record assures it that the terms of the Proposed Decree are fair and adequate, that the settlement is reasonable under the facts, and that, with but two exceptions, [16] it protects the public interest. See Culbreath v. Dukakis, 630 F.2d 15, 23 (1st Cir. 1980); Seymour Recycling Corp., 554 F. Supp. at 1337; United States v. Hooker Chem. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982).

Court approval of the Proposed Decree between the sovereigns and AVX is in the public interest. The voluntary settlement of litigation is high in judicial favor both generally, see, e.g., Citizens For a Better Environment v.

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[16] See infra at 38-42.

Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984), and in CERCLA actions in particular.[17]

The settlement of the natural resource damages action between the sovereigns and AVX will save the sovereigns, and subsequently the public, considerable time and money that would otherwise be expended at trial. Settlement provides substantial funds for the rehabilitation of New Bedford Harbor without the risks and costs of lengthy litigation.

The immediate transfer of funds is a significant factor because it gives the sovereigns control over and the interest derived from a substantial amount of money. The start of any trial in the instant matter, already long delayed by a protracted criminal case the Court is trying in Springfield, Massachusetts,[18] remains uncertain. The first two of several related trials in the instant case, running concurrently, are expected to last three to four months and the substantial expense of such a trial will accord with its length. [19]

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[17] *See supra* at 12-15.

[18] This case is *United States* v. *Levasseur et al.*, No. 86-180-Y. Of it, this Court has written:

> The ambitious indictment sought to be tried here is a prime example of the sweeping powers Congress has conferred upon the executive branch [through passage of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. sec. 1962]. This indictment lists well over twenty predicate acts and involves the presentation of evidence concerning conduct in various locations in Connecticut, Maine, Massachusetts, New York, New Jersey, Ohio, and Pennsylvania. The government's witness list includes 325 names. Thousands of documents and items of tangible evidence are expected to be introduced. The trial itself is estimated to last from six to twelve months.

United States v. *Levasseur*, No. 86-180-Y, slip op. at 36 (D. Mass. May 4, 1988). "The aggregate reimbursement of counsel appointed under the Criminal Justice Act, 18 U.S.C. sec.

(footnote continued)

Moreover, a trial of this claim would be complex, lengthy, expensive and uncertain as an examination of five aspects of this litigation will demonstrate. First, the scope of provable natural resource damages in this matter is

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3006A, to represent these indigent defendants has exceeded $800,000 in the pre-trial jury selection phase of these proceedings." United States v. Levasseur, No. 86-180-Y, slip op. at 14 n.12 (D. Mass. January 5, 1989). Trial commenced in this case on January 9, 1989. The aggregate cost of the representation of these indigent defendants stood at $1,088,932 after three months of trial.

[19] This Court, in an earlier pre-trial order, required the sovereigns to proceed separately against each of the alleged polluters in trying their claims for injury to natural resources (though it later consolidated the trials against Belleville and Aerovox). Due to the exhaustive -- and exhausting -- pre-trial orders entered herein, the parties have been required to request the admission of each and every fact they seek to establish. With the universe of facts thus established, the individual trials have been limited to four months apiece. The jury proceedings are scheduled to run from 9 a.m. to 1 p.m. on each trial day and the related jury-waived trials involving insurance coverage for each of the alleged polluters will run concurrently from 2 - 5 p.m. on the same trial days. The cost to the public of devoting such extensive judicial resources to these cases is not insignificant. In 1987, exclusive of any of the parties' legal costs, it was estimated that one day of trial in a United States District Court costs the public $10,000 - $15,000. See Chappee v. Commonwealth of Massachusetts, 659 F. Supp. 1220, 1226 n.9 (D. Mass. 1987), reversed on other grounds sub nom., Chappee v. Vose, 843 F.2d 25 (1st Cir. 1988). Inflation no doubt has rendered this figure conservative. Moreover, the enormous burden of trying cases such as United States v. Levasseur, see supra note 18, and these cases, virtually back-to-back, necessarily means that scarce judicial resources will be unavailable for other litigants, equally deserving, who have waited just as long for justice. These facts highlight the institutional benefits to be gained from prompt, just settlements.

hotly disputed by the parties whose divergent approaches would result in widely varying recoveries should any liability be found. Second, it may be difficult to link the harm caused by any PCB release from the AVX facility to the PCB's found elsewhere in the Harbor. AVX began operating its New Bedford Harbor plant in 1938. Years may have passed between the time of the releases and any quantifiable impact upon the Harbor; years more may have passed before any such impact was first discovered. Moreover, at least two types of hazardous PCB waste were allegedly released into the Harbor by the operators of the two different New Bedford plants. Those two plants have been under the management and control of five different corporate owners. Damage caused by the behavior of AVX may be difficult to measure and distinguish from damage caused by other plant operators. Third, and relatedly, the responsibility for the condition of New Bedford Harbor is diffuse in another respect. The sovereigns here seek to recover only for that injury to natural resources caused by PCB contamination, yet the Harbor appears rife with a variety of contaminants. It may prove difficult to distinguish whether some injury is caused by PCB's or by other pollutants. While problems of divisibility of the injury and damages due to PCB contamination may be less a concern to the sovereigns because they may well be able to hold the defendants jointly and severally liable, protracted contribution litigation among any non-settlors may be necessary. Fourth, the unsettled nature of CERCLA law, which the myriad pretrial motions in this matter reflect, argues in favor of this settlement. The inherent uncertainty in such a state of affairs makes settlement desirable for the parties and satisfies the public interest by securing a substantial recovery in the face of unknown and perhaps unknowable odds. Fifth, AVX sold its interest in the plant in 1973, seven years before the passage of CERCLA, and pre-enactment damages to natural resources stemming from pre-enactment releases are not compensable under CERCLA. 42 U.S.C. sec. 9607(f)(1). Thus, whether, and to what extent, the sovereigns will be able to recover for natural resource damages from AVX remains in doubt. In light of these factors and the novelty of this action, this Court rules that the settlement of the natural resource damages claim under section 107 of CERCLA between the sovereigns and AVX is fair, reasonable, and in the public interest.

Turning to the other factors in the matrix, the Court notes that only two of the four non-settlors oppose the settlement. In addition, none of the non-settlors disputes that this settlement was arrived at by competent counsel after protracted arms-length negotiations. Without question, that settlement is based on the extensive discovery that has already occurred in this case.[20] That discovery renders unnecessary the evidentiary hearing Aerovox has requested.[21]

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[20] "Creative lawyers . . . have shown that both justice and efficiency can be achieved by those willing to stretch the bounds of the existing procedural scheme." American Law Inst., Complex Litigation Project 11 (Tent. Draft No. 1, April 14, 1989). As mentioned above, *see supra* note 19, one of this Court's pre-trial orders requires that each litigant (footnote continued)

Moreover, the explanation for the amount of the settlement is reasonable. Aerovox contends that on its face settlement is unreasonable where the sovereigns are seeking

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request the admission, pursuant to Fed. R. Civ. P. 16 and 36, of every fact which it intends affirmatively to prove at trial. The order bars the litigants from offering affirmative evidence on any point as to which no request has been filed and requires that each request be detailed "to the level of specificity of a patent claim." In this fashion the Court sought to establish the entire universe of facts with which it and the jury must wrestle in this complex litigation. As a result, the sovereigns have filed tens of thousands of requests for admission, the great bulk of which are supported by detailed data gleaned from exhaustive discovery and trial preparation materials. The notebooks in which the requests are cataloged fill four full bookcases.

[21] Of course, there are other reasons not to hold an evidentiary hearing. First, such a hearing would amount to a trial on the merits in terms of the time and expense involved. Such a hearing is impractical given the facts in dispute and is not required by precedent or policy. *See City of New York*, 697 F. Supp. at 689-92 (denying a hearing regarding a CERCLA settlement). In *United States* v. *Ketchikan Pulp Co.*, 430 F. Supp. 83 (D. Alaska 1977), the parties disagreed as to the scope of an approval hearing for a consent decree in an action brought under the Federal Water Pollution Control Act, 33 U.S.C. sec. 1311 *et seq.* The *Ketchikan* court ruled that "[a]lthough the court is obligated to protect the public interest it is not necessary to hear all the evidence to perform that function." *Id.* at 86. Moreover, to grant inevitably lengthy hearings in cases such as this would either frustrate the express intent of Congress to encourage settlement or negate the benefits of any settlement that resulted. *See supra* note 13. This Court does not require a factual presentation to support every settlement reached by a government agency. "Unless a consent decree is unfair, inadequate or unreasonable, it ought to be approved. . . . [T]he courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment." *Securities and Exchange Commission* v. *Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *accord United States* v. *Jackson*, 519 F.2d 1147, 1151 (5th Cir. 1975).

The objecting non-settlors generally assert that the record before the Court is insufficient. Without more

(footnote continued)

50 to 70 million dollars in natural resource damages and are offering to extinguish the liabilty of one of the five jointly and severally liable defendants for a mere two million dollars. However, despite what the sovereigns are seeking now in damages, their unchallenged assertion is that, at the time this settlement was negotiated, they had estimated the damages to be 34 million dollars. Discounting that sum in light of the complexity of the case, the novelty of the law and the problems of proof, the sovereigns determined that twelve million dollars would be a satisfactory overall settlement of this aspect of the case at that time. Dividing that figure in half between the two allegedly polluting plants involved left six million dollars to be collected from AVX, Aerovox and Belleville.[22] The sovereigns sought 2.3 million dollars from each of the first

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concrete objections to the settlement -- other than the amount versus the damages sought, an argument disposed of elsewhere -- a full-blown evidentiary hearing which would amount to a fishing expedition is neither necessary nor prudent. *See City of New York*, 697 F. Supp. at 692 (holding that generalized assertions that the record before the court is insufficient are not enough to require a hearing). The Court also notes that courts largely have followed the cleanup versus monetary settlement distinction in determining whether to hold hearings. *See id.* at 689-91 (discussing the cases and declining to give a hearing regarding a monetary settlement).

[22] The other allegedly polluting plant was owned, at all material times, first by the defendant Cornell-Dubilier Electronics, Inc., and then by the defendant Federal Pacific Electric Company. Apparently, the sovereigns demanded the remaining six million dollars from these two defendants.

two, and 1.4 million dollars from Belleville.[23] Hard negotiation, one imagines, resulted in the final figure of two million dollars. Cf. City of New York, 697 F. Supp. at 693 (accepting a settlement that required seven of fifteen main defendants to settle their liability for approximately fourteen million dollars where the estimated remediation cost was 400 million dollars).

As noted above, this Court is not required to ensure that the sovereigns have struck the best deal possible. Nor must this Court ensure that the settlement is perfectly calibrated in terms of shares of liability so long as it is generally fair and reasonable. Thus, the Court is not disturbed that AVX may have owned the polluting plant the longest and thus, if all other factors are ignored, may be assumed to have caused the most pollution. On the other hand, AVX may well deserve a premium, at least in the view of the sovereigns, for being the first defendant to settle, and for doing so well in advance of the trial of its portion of the case. Fairness does not require, when later discovery and developments in the law convince the sovereigns that the damages are greater and their case stronger than they first appeared, that AVX should be required to pay more. Quite the contrary -- AVX deserves, and the sovereigns apparently have seen fit to award, a lower settlement amount for its having negotiated in good faith early on. If this price is no longer available to the other defendants, they have only themselves to blame; and if the SARA amendments, with respect to contribution, leave the remaining defendants on the natural resource damages issue facing greater liability than their pro rata share, "their dispute is with Congress." City of New York, 697 F. Supp. at 694.

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[23] Belleville is no longer actively engaged in business and has transferred all its assets to Aerovox. Acushnet I, 675 F. Supp. at 38. As a practical matter, therefore, the discount offered Belleville appears to reflect the additional difficulty of obtaining indemnity from its insurer since that party, Lumbermens Mutual Casualty Co., like the insurers of all the defendants, is defending under a reservation of right and is vigorously pursuing a pre-trial declaration that it has no coverage obligations to Belleville.

Finally, this Court is unpersuaded by Aerovox's argument that, if the sovereigns chose to settle AVX's portion of the case for two million dollars, the sovereigns should bear the loss for any shortfall caused by the discounted settlement. That is, the non-settlors should not be required to make up the difference for the sovereigns' mistaken settlement strategy by paying the remainder of the settlor's share as well as their own.

The problem with this approach is that it would effectively read out of subsection 113(f)(2) the last phrase: "[the settlor's settlement] reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. sec. 9613(f)(2). A court should not construe a statute so as to render any of it a nullity, Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249, 105 S. Ct. 2587 (1985), but Aerovox's argument would do just that. It is self-evident that generally defendants do not settle litigation for the full value of the asserted damages. Faced with a demand for full damages, a defendant might just as well go to trial, save for the litigation costs and possible interest on a resulting judgment. Thus, in the general run of CERCLA cases, this Court imagines that defendants will generally settle for substantially less -- indeed, often for far less given the inherent problems of proof in these cases -- than the asserted damages. The Court further imagines that in all of these cases the non-settlors will be able to muster the very argument raised here: fairness requires a proportionate reduction. And so the last phrase of the statute, squarely placing the balance of the settled share on the non-settlors, disappears. This Court will not so frustrate Congress' will.

B. The National Wildlife Federation's Contention that the Proposed Decree is Not in Compliance with Section 122 of CERCLA.

The National Wildlife Federation moves that this Court reject the Proposed Decree because it does not comply with the intent or provisions of CERCLA, is not fair, adequate and reasonable, and is not in the public interest. More specifically, the Federation contends that the Proposed Decree does not provide for full restoration and replacement of the injured natural resources and that it waives claims for future damages in contravention of CERCLA's intent and in violation of two provisions of section 122 of CERCLA, 42 U.S.C. sec. 9622.

The first provision in question, subsection 122(j)(2), the natural resource damages settlement provision of CERCLA, provides:

> An agreement under this section may contain a covenant not to sue under section 9607(a)(4)(C) of this title for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

42 U.S.C. sec. 9622(j)(2).

The Federation interprets subsection 122(j)(2) to require that any consent decree entered into under the CERCLA settlement provision that includes a covenant not to sue for natural resource damages under subsection 104(a)(4)(C) must also provide for full restoration and replacement of the injured natural resources (or acquisition of equivalent resources) as required by the language of, and policies underlying, CERCLA. The Proposed Decree between the sovereigns and AVX includes a covenant not to sue AVX for natural resource damages. The Federation argues that the Proposed Decree should not be approved because the sovereigns' settlement for substantially less than the full natural resource damages asserted means that the Proposed

Decree necessarily fails to provide for the "actions necessary to protect and restore" New Bedford Harbor under the mandate of section 122.

The second provision in question, subsection 122(f)(6)(A), states:

> (6) Additional condition for future liability
>
> (A) Except for the portion of the remedial action which is subject to a covenant not to sue under paragraph (2) or under subsection (g) of this section (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned.

42 U.S.C. sec. 9622(f)(6)(A). [24]

The Federation interprets this subsection to mean that CERCLA settlements including a covenant not to sue must contain a "reopener" clause that permits future litigation between the United States and the settlors concerning further damage due to presently unknown conditions. Because the Proposed Decree contains no such clause -- indeed, the sovereigns, in the Proposed Decree, explicitly promise not to sue AVX for damages presently unknown caused by the release of PCB's, Proposed Decree at para. VII -- the Federation argues it should not be approved.

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[24] 42 U.S.C. sec. 9622(f)(6)(B) provides an exception to this provision not relevant here.

The Federation's argument, at first glance, appears to fail primarily because the requirements of section 122 apply only to a natural resource damages settlement that is part of the settlement of a larger cleanup. Indeed, both the language of the statute and the legislative history lend significant support to this view.

Admittedly, section 122 is not a model of clarity. The thrust of its provisions, however, suggest that it is intended to reach cleanup settlements. Its opening provision, subsection 122(a), which is best understood as an introduction of sorts, grants the President authority to enter into agreements "to perform any response actions. . . . Whenever practicable and in the public interest, . . . the President shall act to facilitate agreements under this section . . . in order to expedite effective remedial actions and minimize litigation." 42 U.S.C. sec. 9622(a)(emphasis added). The subsections of section 122 that follow provide the President with a variety of procedures through which to achieve and structure such cleanup settlements. Those sections, as one would expect, largely focus on the cleanup aspects of such a settlement. [25]

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[25] For example, subsection 122(c)(1) ties the scope of a covenant not to sue to the permanency of the remedy (i.e., cleanup) undertaken by the settlors. Subsection 122(d)(1) explicitly discusses "agreement[s] . . . with respect to remedial action. . . ." (Emphasis added.) Subsection 122(e)(1) provides for special notice and moratorium procedures for use when "a period of negotiations . . . would facilitate an agreement with potentially responsible parties for taking response action . . . and would expedite remedial action." (Emphasis added.)

The legislative history, from beginning to end, further emphasizes the concern of Section 122 with cleanup settlements. As the 1985 House Judiciary Committee Report stated, "This new section sets forth a series of provisions designed to encourage and facilitate negotiated private party *clean-ups* of hazardous substances in those situations where negotiations have a realistic chance of success." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 3, at 29 (1985)(emphasis added). *Accord* H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 5, at 58 (1985)("This new section 122 is intended to encourage and establish procedures and protections *pertaining to negotiated private party cleanup* of hazardous substances where such cleanup is in the public interest")(emphasis added). Congress was concerned with and condemned past "sweetheart deals that EPA negotiated with [potentially responsible parties] several years ago that led to the resignation of Rita Lavelle and Anne Burford," and passed section 122 to ensure that the "EPA can negotiate tough settlements with [potentially responsible parties] in the interest of cleaning up a site more quickly. . . . Settlement should only occur if the President is satisfied that the site will be cleaned up more quickly and at least as completely as it would be if the fund were to perform the cleanup. Without doubt, settlement of cases is not an opportunity to avoid any of the cleanup requirements or procedures of the act." 132 Cong. Rec. S14,918 (daily ed Oct. 3, 1986)(statement of Sen. Mitchell). The Joint

Explanatory Statement of the Committee of Conference was no less clear with respect to the cleanup orientation of section 122 in describing the initial versions as passed by the Senate and the House:

> The Senate amendment authorizes the President to enter into settlement agreements with potentially responsible parties for the payment or conduct of remedial action.
>
> * * *
>
> The House amendment confirms the authority of the . . . EPA to enter into settlement agreements with responsible parties regarding the clean-up of sites where hazardous substances have been or are threatened to be released.

H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 251 (1986)(SARA Conf. Rep.)(emphasis added). The Conference substitute provision similarly emphasized cleanup settlements:

> The purposes of the settlement procedures set forth in section 122 are to expedite settlements and to assure the effective clean-up of Superfund sites.

Id. at 252 (emphasis added). [26]

Viewed in this context, neither subsection 122(j) (covenant not to sue) nor subsection 122(f)(6)(A) (reopener clause), strictly speaking, seems applicable to this settlement. Subsection 122(j) on its face pertains to "agreement[s] under this section." 42 U.S.C. 9622(j)(2).

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[26] See also 132 Cong. Rec. H9563 (daily ed. Oct. 8, 1986) (Statement of Conf. Comm. Chair. Rep. Dingell)(Section 122 was "designed to facilitate settlement negotiations to expedite effective site cleanup by private parties. . . .") (emphasis added); 132 Cong. Rec. S14,903 (daily ed. Oct. 3, 1986) (Statement of Sen. Stafford, Senate floor manager for SARA)(Section 122's purpose is to encourage government agencies "to increase their efforts to impose the burden and costs of cleanups on responsible parties through the use of settlement agreements")(emphasis added).

Because section 122 covers cleanup settlements, subsection 122(j) therefore would not seem to apply to settlements limited to natural resource damages. [27] This result is not necessarily illogical, as the Federation asserts. Congress, for example, may have been concerned that natural resource damages claims otherwise would be lost in the rush to secure a cleanup settlement and thus moved to strengthen substantially the hand of the federal natural resource trustee. Such a concern is at least muted where the natural resource damages claim is settled separately. [28]

With respect to subsection 122(f)(6)(A), it similarly does not appear to apply to this non-cleanup settlement, as the Federation essentially admits. *See* Reply of the Natural Wildlife Federation to Plaintiffs' Response to NWF's

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[27] Indeed, Rep. Jones, apparently referring to subsection 122(j), noted in his remarks to the House that "the conference report requires EPA to notify all Federal trustees of any effort to negotiate cleanup agreements with responsible parties where there may be damages for natural resources." 132 Cong. Rec. H9612 (daily ed. Oct. 8, 1986). Clearly then, the natural resource damages settlement provision of subsection 122(j) appears to be intended by Congress to apply in the cleanup settlement context.

[28] A ruling that subsection 122(j) does not apply would appropriately prompt some concern. Such an interpretation of section 122 permits it to be easily side-stepped by parties clever enough to bifurcate the settlement into two agreements -- one for the cleanup and one for the natural resource damages. Indeed, courts would need to beware of such potential, collusive results and be prepared to thwart them by refusal to sanction such settlements that seek to evade by artful drafting the clear intent of Congress. In any event, such concerns are not present in this case. The procedural posture of this litigation -- specifically, the fact that the natural resource damages claims will be tried before the cleanup claims -- fully explains why this natural resource damages settlement precedes and is separate from any cleanup settlement.

Opposition to Proposed Partial Consent Decree (Docket #1235) at 5. Indeed, it does not seem to apply by its own terms, nor in the context of section 122 as a whole. Subsection 122(f)(6)(A) states, "Except for the portion of the *remedial action* [subject to covenants not to sue under other section 122 provisions,] a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant [making the person liable for future releases arising from conditions unknown] at the time the President certifies . . . that *remedial* action has been completed at the facility concerned." (Emphasis added.) Such language strongly suggests that the subsection is concerned with cleanup settlements. The legislative history, to the extent it addresses this aspect of subsection 122(f), confirms this interpretation. Senator Stafford, for example, stated that "the bill reaffirms the President's authority to preserve the ability to take enforcement actions . . . if any future problems develop at a site *cleaned up under a consent decree*." 32 Cong. Rec. S14,904 (daily ed. Oct. 3, 1986) (emphasis added); *see also* 32 Cong. Rec. S14,919 (daily ed. Oct. 3, 1986)(Statement of Sen. Mitchell on subsection 122(f)).

Despite the apparent thrust of the language and the legislative history of section 122 in general and the two specific provisions in particular, this Court remains troubled by a holding that the two provisions do not apply to this settlement. Admittedly section 122 in general and the two provisions in particular appear to apply only in the context of a cleanup settlement. Yet no separate corresponding provision addresses the requirements of a natural resource settlement preceding a cleanup settlement. The lack of such a provision is fully explained by the fact that, customarily, natural resource damages settlements follow or are contemporaneous with cleanup settlements. This is so because, customarily, natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment. As a residue of the cleanup action, in effect, they are thus not generally settled prior to a cleanup settlement. For the reasons set forth in Acushnet II, see id. at 2-5, in the instant matter, the sovereigns' natural resource damages claim will be tried before the response costs claim. [29] Thus, this case presently stands in a procedural posture that Congress, in all likelihood, did not foresee. Even though Congress, never anticipating the circumstances of the instant matter, had no intent one way or the other whether the two provisions in question should apply to the Proposed Decree, this Court holds that they do apply in order to fulfill the more general intent of Congress with respect to the proper manner of settling CERCLA actions.

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[29] Due to the Court's inability to commence the trial of this action as soon as it might wish, see supra at 20 & n.18, it may yet be that the administrative predicate for trial of the response costs claim will be laid before the first segment of the trial of the natural resource damages claims gets underway. Should that be the situation, the Court will consider whethe it is in the interest of justice to frame jury questions as to the response costs claim and try that claim to the same jury that considers the claim for natural resource damages.

Moreover, had this Court held that these provison do not apply, the general intent of Congress with respect to settlements still could not be ignored. As noted above, one of the factors that a court must consider in evaluating a consent decree is its consistency "with . . . the mandate of Congress." *City of New York*, 697 F. Supp. at 692; *see also* *United States* v. *Seymour Recycling Corp.*, 554 F. Supp. at 1337 (pre-SARA CERCLA case). Thus, regardless whether the provisions of section 122 apply to settlements limited to natural resource damages claims, the statute without question represents Congress' clearest statement on CERCLA settlements in general and natural resource damages settlements in particular.

With respect to subsection 122(j)(2), Congress' concerns expressed therein -- that "the potentially responsible party agree[] to undertake appropriate actions necessary to protect and restore the natural resources damaged . . ." -- apply equally to the instant Proposed Decree. Thus, on this alternative ground, the Court must examine the settlement to ensure that the Congressional mandate has been satisfied.

The Court holds that it has. The Federation argues that subsection 122(j)(2) means that a settlement is only possible where the potentially responsible party agrees to fully restore the damaged natural resources. The only support for this position is a snippet of legislative history. [10] Such an interpretation seems neither requisite nor wise. Quite clearly, few settlements would ever be possible where the United States' bottom line is 100% of asserted damages. Nearly all defendants would prefer to go to trial thereby thwarting the clear intent of Congress, discussed above, to promote CERCLA settlements.

An interpretation of the statute more in keeping with the intent of, as well as the language employed by, Congress is one that requires the United States to assess the strengths and weaknesses of its case and drive the hardest bargain it can. As fully outlined above, this Court is satisfied the United States [11] has done just that with respect to this aspect of the case and therefore holds that the settlement satisfies the Congressional intent that AVX, through the payment of two million dollars, "undertake appropriate actions necessary to protect and restore the natural resources damaged" in New Bedford Harbor. 42 U.S.C. sec. 122(j)(2). However, the Court is unaware of any indication in the record before it that the Federal natural resource trustee (the "trustee") has agreed to the covenant not to sue. Until such time as the Court is made aware that the trustee does so agree, the Court may not and will not approve the Proposed Decree.

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[10] The remarks of Representative Jones, Chairman of the Merchant Marine Committee, one of the committees reporting SARA to the full House, constitute the history in question: "[A] covenant not to sue may be agreed to by a Federal trustee only if the responsible party agrees to restore, rehabilitate or acquire the equivalent of damaged natural resources." 132 Cong. Rec. H9612 (daily ed. Oct. 8, 1986). The Court finds this statement unpersuasive because Representative Jones made it in the course of sketching the broadest outlines of the bill, rather than in an analysis of what particular language in that bill meant. Thus, the words are more a shorthand description than an interpretation of subsection 122(j)(2).

[11] Subsection 122(j)(2) names "the Federal natural resource trustee [as the one who] may agree to such covenant [not to sue as is contained in the Proposed Decree]." 42 U.S.C. sec. 122(j)(2).

Just as with subsection 122(j)(2), even had this Court held that subsection 106(f)(6)(A) did not apply to the Proposed Decree, the underlying policy expressed therein by Congress informs this Court's evaluation of the Proposed Decree. The thrust of this subsection is to ensure that the federal government, and thus ultimately the taxpayer, does not bear the costs of future unknown damages. Rather, such costs appropriately should be borne instead by those responsible for the pollution. This is in keeping with Congress' intent to make responsible parties pay for the problems caused by their own pollution. E.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986). Indeed, the legislative history leaves no doubt that preventing potentially responsible parties from escaping future liability was a primary concern of Congress. As Senator Stafford stated,

> [C]ovenants not to sue for undetected contamination at a site [pursuant to subsection 122(f)(6)(B)] are included in consent decrees under extremely rare circumstances. In over 200 cases settled under the Superfund Program, the Government has included such covenants in only

> two or three cases. The provision anticipates no increase in or expansion of this policy or its rate of application.

132 Cong. Rec. S14,904 (daily ed. Oct. 3, 1986)(emphasis added).

Across the aisle, Senator Mitchell was equally emphatic about the dangers of releasing potentially responsible parties from future liability:

> In addition, it is important for the President (when considering whether to include a covenant not to sue) to ask a basic question: Who will pay if there is a problem in the future? So little is known about much of the contamination at Superfund sites, that it is difficult to be sure that no future liability will occur. . . . [F]uture enforcement action should be an option under the covenants to assure that the public health is protected. From the perspective of the public, if the President does not use every option at the President's disposal to protect the public health, then the public is placed at a severe disadvantage.

132 Cong. Rec. S14,919 (daily ed. Oct. 3, 1986). See also 52 Fed. Reg. 28,038, 28,040-41 (July 27, 1987)(stressing the Congressional concern that potentially responsible parties should remain liable if an agreed upon settlement proves inadequate to protect the environment and the public health).

Congress' response to these concerns was to require reopener provisions except in those rare cases where "extraordinary circumstances" were present. 42 U.S.C. sec. 9622(f)(6)(B). Indeed, the House Conference Report reveals that a provision more hospitable to reopeners was replaced by a tougher measure in the Conference:

> The conference substitute deletes the House provision regarding a potentially responsible party's ability to obtain a covenant not to sue

> without a "reopener" for unknown conditions if that responsible party contributes to a "Ground-water and Surface Water Protection Fund" for any future problems at the facility. Instead, new section 122(f)(6)(B) is added to require, except in extraordinary circumstances, reopeners for unknown conditions. The provision now states that settlements shall not be granted without reopeners for unknown conditions, except in extraordinary circumstances where all other terms and conditions of the settlement agreement are sufficient to protect health and the environment from any future releases at or from the facility. This provision should be implemented in a manner consistent with the current application of the Administration settlement policy as to unknown conditions.

H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 255 (1986)(emphasis added).

This Congressional concern is as applicable to a natural resource damages settlement as it is to a cleanup settlement. In both cases, unknown conditions can lead to further releases causing further damages. Admittedly, requiring such a provision will make settlements somewhat more difficult to achieve. Beyond peradventure, however, Congress is willing to accept such a trade-off in return for greater security that the settlement will adequately resolve a pollution problem in the cleanup context and no reason is evident why that intent should not apply to the natural resource damages context.

As noted, the present Proposed Decree contains no such reopener clause. Indeed, some of the language in it appears expressly to guarantee AVX that the sovereigns will not sue AVX for unknown damages in the future caused by the release of PCBs. Proposed Decree at para. VII. On the record before the Court, no "extraordinary circumstances," as the term is used in subsection 122(f)(6)(B), appear present that would place this case in that rare one percent of cases identified by Senator Stafford that warrant the absence of such a clause. The Court thus rules that the lack of a reopener clause is a violation of subsection 122(f)(6)(A) as well as against the intent of Congress and not ~~in the~~ public interest.

V

For the reasons stated above, the Proposed Decree is approved in all respects and every particular save two: 1) it is not clear to the Court on this record that the trustee has agreed to the covenant not to sue, 42 U.S.C. sec. 122(j)(2), and 2) the Proposed Decree fails to include a "reopener" provision as "an exception to the covenant [not to sue] that allows the President to sue [AVX] concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions that are unknown at the time [of the entry of the Proposed Decree]." See 42 U.S.C. 9622(f)(6)(A). Should the trustee agree to the covenant and the parties negotiate such a reopener provision and resubmit the Proposed Decree as thus amended, the Court will act thereon promptly.

William G. Young
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

SENATOR HOWELL HEFLIN -- QUESTIONS

1. If confirmed by the Senate as Assistant Attorney General, what will be your priorities and goals during your tenure with the Land and Natural Resources Division?

Answer:

My primary goal will be to promote vigorous and effective civil and criminal enforcement of federal laws protecting the environment. The Land and Natural Resources Division has compiled an enviable record of environmental enforcement. Continuing threats to the environment and the recent enactment by Congress of new laws protecting the environment require a continued strengthening of enforcement. My priority is to help carry out President Bush's stated commitment to this goal. I will, however, not neglect the other important work of the Division, which includes legal representation of many federal government agencies and of Indian tribes. I also hope to contribute, on behalf of the Administration, to Congress's consideration of new laws to improve environmental protection.

2. How does your background in private practice, as a professor of law, and your limited experience with the Environmental Protection Agency qualify you for the position of Assistant Attorney General for the Land and Natural Resources Division?

Answer:

I have specialized in environmental and administrative law for over 20 years. I believe that my experience in practice, in teaching and scholarship, in advising government agencies (including the Congressional Office of Technology Assessment and the National Academy of Sciences, as well as EPA), makes me well-qualified to serve as Assistant Attorney General for Land and Natural Resources.

3. The Reagan Administration strongly supported giving the states increased responsibility to address their own environmental problems. One example of this delegation of responsibility is the Coastal Zone Management Act, which allows states to establish regulations to protect their fragile coastline areas.

   What guidelines are used by the Department of Justice in deciding whether to argue that a federal regulation or law should preempt a state regulation or law?

Answer:

I understand that the question of the appropriate balance of state and federal authority under the Coastal Zone Management Act

(CZMA) is one that has arisen, in practice, rather infrequently in the Department's litigation.

While the statute evidences general congressional encouragement of state planning and management of the coastal zone, the terms of the act and its legislative history indicate that Congress intended these aims to be accomplished by the exercise of existing state powers. The stated purpose of the legislation is "to encourage the states to exercise their full authority over the lands and waters of the coastal zone." 16 U.S.C. §1451(h). The CZMA provides that the act was not intended to alter the respective jurisdictional boundaries of the state and federal governments. 16 U.S.C. §1456(e). Accordingly, it does not foreclose possible preemption of state measures by various federal environmental laws, such as the Endangered Species Act, Marine Mammal Protection Act, Marine Protection, Research and Sanctuaries Act, Clean Water Act, and Outer Continental Shelf Lands Act, which apply to both state coastal areas and to activities on the federal outer continental shelf. Our coastal areas represent a significant environmental and economic resource and demand a carefully crafted process to ensure the preservation and protection of the legitimate interests of both the states and the federal government. The CZMA provides a foundation for decisionmakers to use in reconciling these often competing interests. I understand that when conflicts do arise, the Justice Department is committed to trying to reconcile them without resort to litigation, but is also ever mindful of its obligation to discharge the responsibilities imposed on it by law.

What is the justification for the Department's opposition to actions taken under state coastal management plans that the federal government has approved?

Answer:

Given the flexibility afforded the states in constructing their state programs submitted to the Secretary of Commerce for approval, it is impossible for the Secretary of Commerce to foresee all possible applications of a program that might raise future problems arising out of the supremacy of federal law and the myriad of federal environmental statutes. Accordingly, there may be instances where the federal government would be compelled to contest a state's application of its approved state program on the ground that it is preempted by overriding federal law.

I understand, however, that state and federal interests can usually be resolved in a mutually satisfactory manner. Primary land-use priorities are established in state coastal zone plans, giving state program managers both the direction and the flexibility needed to meet state coastal management goals. Other provisions of the CZMA have encouraged federal decisionmakers to be mindful of state planning objectives and to conform federal activities, to the maximum extent practicable, to the requirements of approved state programs. In this manner, the cooperative federalism envisioned by the CZMA can be achieved.

4. Much of your writing challenges the basic premises of our existing environmental regulatory system. You propose as an alternative a free market approach in which pollution permits would be freely traded among polluters. In one article, you concluded, "both for the sake of the economy and the environment, the dismantling of our neo-mercantilist regulatory and resource policies must be accomplished...quickly."

   Please explain the system of economic incentives that you would employ as an alternative to the existing environmental regulatory system.

   Have you discussed these views with the President, the Attorney General or others within the current Administration?

   Answer:

I favor prudent use of economic incentives to harness market forces to advance environmental protection. I believe that experience both in the United States and abroad shows that careful use of such incentives can enable us to achieve environmental goals at less cost, enhance the international competitiveness of U.S. industry, and reward those industries who develop new and more effective ways of reducing pollution and other threats to the environment.

For the foreseeable future, I believe, economic incentives should not replace the existing regulatory approach, but rather supplement it. President Bush's measures for dealing with acid rain in his proposed Clean Air Act are an excellent example. Existing regulatory controls would establish a baseline of required cleanup by all sources. Additional cleanup would be achieved by requiring further reductions of emissions but allowing those sources that exceeded this requirement to trade reduction credits to those who did not. This scheme would ensure that the overall level of required reductions would be achieved, but would reduce the costs of doing so by encouraging sources with lower control costs to assume more of the cleanup burden.

Of course, this system will require effective monitoring and enforcement. Also, it is clear that many environmental problems must be dealt with through traditional regulatory controls. I am committed to vigorous enforcement of all such measures as required by existing law.

I have not discussed my views on these issues with the President. I have discussed them, very briefly and in general terms, with the Attorney General.

5. What do you see as the future of the Division? In what direction do you plan to lead it during your tenure as Assistant Attorney General?

Answer:

I believe that President Bush's commitment to environmental protection will require continued strengthening of environmental enforcement, in which the Land and Natural Resources Division plays a key role. It will have to use its existing resources with top effectiveness, and it is my understanding that a request for additional staff is pending in the President's FY 1990 budget. I also believe that the Division should play a role in assisting the Administration and Congress in devising new, more effective, and less burdensome approaches to solving environmental problems. I plan to lead the Division in these several efforts.

6. What is the relationship between the Land and Natural Resources Division and the Environmental Protection Agency?

Answer:

The Land and Natural Resources Division represents the Environmental Protection Agency in both its enforcement and defensive litigation. We closely coordinate with the Agency on litigation matters and, under a memorandum of understanding with EPA, provide the agency with regular and detailed reports setting forth the progress on and status of enforcement actions.

7. An ongoing concern with the American public and Congress is the rate at which waste sites are being cleaned. How will you work with the Environmental Protection Agency and other Federal, State and Local agencies to expedite the cleanup of the nation's hazardous waste sites?

Answer:

The Administrator of EPA, Bill Reilly, recently presented a 90 day study of the Superfund program which sets forth his strategy for expediting and improving hazardous waste cleanups, including enhancing cooperation with other levels of government. I have been reviewing that study and endorse the goals that the Administrator has set. We will continue to work closely with the agency in implementing those goals; in fact, I understand that attorneys from the Lands Division are participating on the study's follow-up report to Congress, scheduled for September 21st.

8. Are you willing to commit to the vigorous prosecution of hazardous waste violations, including assistance to the Environmental Protection Agency in the investigation of such violations?

Answer:

Both the Attorney General and I have a keen interest in strong enforcement of our criminal laws and I have no hesitation, as I stated at the hearing on July 26th, in making a strong commitment to vigorous prosecution under all environmental laws, including those regulating hazardous waste.

Environmental Crimes Section attorneys work closely with investigators at both the FBI and EPA to develop these cases. I am committed to strengthening prosecution by the Division of hazardous waste violations, including assistance to the Environmental Protection Agency and other agencies in their investigations of such violations.

9. As the top manager of an office experiencing tremendous growth, how will you ensure the highest professional standards in conduct of the government's environmental litigation?

Answer:

In my own career as a lawyer and legal educator, I have been committed to professional excellence. I believe that the Division has succeeded in recruiting lawyers of very high ability and maintaining high professional standards. I plan to ensure that the Division's commitment to excellence is maintained by personally reviewing the most important legal work of the Division and ensuring a system of management dedicated to this goal.

One of the things I am most looking forward to in coming to the Justice Department is to continue my work with some of the best and brightest of our young attorneys just out of law school. The Department, as you probably know, has a vigorous recruitment program which is highly competitive and attracts some of our best young legal scholars. I am told that last year the Lands Division received almost 500 applications from top law school graduates to fill some 15 slots. In addition, the Department provides incentives to experienced attorneys to stay with the government. I will personally try to set an example to attorneys in the Division by observing strict ethical standards and by demanding intellectually rigorous standards in our legal product.

10. The "Superfund" program relies extensively on private contractors. Not only are contractors doing the actual clean-up work, they are also conducting studies required to assess the extent of contamination and to develop the remedial action to be taken. In addition, they are writing records of decision for the Environmental Protection Agency, finding expert witnesses, and gathering documents needed for litigation. Private contractors are clearly in the business to make money, so a profit factor must be built into the fees charged for all these activities.

    What are your views in regard to the government having its own experts and litigation support capability rather than relying on the efforts of private contractors?

    Answer:

I am aware that the use of contractors has been one area of criticism lodged against EPA in the management of the Superfund program and I believe the 90 day report addressed this issue. In the context of actual litigation, it is the practice of the Justice Department to ensure that we have the best experts available to establish the government's case. We have a litigation support fund for that purpose.

Obviously, our goal -- both at EPA and DOJ -- must be to accomplish the purposes laid out by Congress in enacting Superfund as efficiently and cost effectively as possible. That may involve the use of contractors for certain purposes and at certain sites, and not at others. I will be happy to work with Administrator Reilly in continuing to review this problem.

11. There are criminal penalties in most of the environmental laws which you enforce. What priorities do you intend to place on criminal enforcement?

    Answer:

I intend to give criminal enforcement of the environmental laws a very high priority. Since an Environmental Crimes Unit was first established in the Land and Natural Resources Division in October 1982, criminal enforcement has emerged as a valuable tool in encouraging strict compliance with environmental requirements. The threat of heavy fines and imprisonment as a consequence for cutting corners and avoiding responsibility is a powerful deterrent for corporate decision makers. We currently have 20 attorneys in the Environmental Crimes Section who work with United States Attorneys' offices all over the country in investigating and prosecuting these cases.

What sort of results have been achieved by the Division in the past?

Answer:

The results of the criminal enforcement program have been quite impressive. As of July 1, 1989, 412 criminal convictions have been obtained. That number includes 119 corporations and 293 individuals. More than $23,000,000 in criminal fines have been imposed. Over the last four years, the number of fines for each fiscal year has more than doubled that of the previous year. More than 254 years of jail time has been imposed, with more than 87 1/2 years actually served (not suspended). The amount of actual incarceration imposed in FY 89 will more than triple the amount imposed in FY 88. Moreover, under the federal sentencing guidelines that are in effect for crimes committed on or after November 1, 1987, jail sentences for environmental crimes will increase significantly.

The cases prosecuted have involved a broad spectrum of industry, including shipbuilders, oil refineries and pipelines, tanneries, demolition companies, chemical storage facilities, wood preservers, printing companies, vehicle emissions testing laboratories, electroplating companies, food processors, drum and barrel recyclers, dairies, auto body shops, dry cleaners, and companies whose sole or primary business is the handling of hazardous waste. They have included a number of large, Fortune 500 companies, including Nabisco, Ralston-Purina, Keebler, W.R. Grace & Co., Ashland Oil, Orkin Exterminating Co., Texaco, Ocean Spray Cranberries, and Pennwalt. In addition, a few cases have been brought against employees at federal facilities. In May 1989, three civilian managers at the Army's Aberdeen Proving Ground in Maryland were sentenced for illegal storage and disposal of hazardous waste. In June 1989, a criminal search warrant was executed at the Department of Energy's Rocky Flats Nuclear Weapons Plant outside of Denver, Colorado, based on allegations of violations of the Resource Conservation and Recovery Act and the Clean Water Act.

Is the Division aggressively using the Criminal Division?

Answer:

The Environmental Crimes Section, now a staff of 20 prosecutors, was organized in order to provide a specialized legal staff capable of carrying out the effective enforcement of federal criminal laws relating to protection of the environment. The Crimes Section works with United States Attorneys' offices to develop and prosecute these cases. The Section's attorneys prosecute these cases themselves and also provide support and assistance to assistant United States attorneys in their prosecution of these cases. There are a number of specially trained federal criminal investigators who work with these prosecutors. The Environmental Protection Agency has 48 experienced criminal agents investigating these cases and the Federal Bureau of Investigation has 139 agents working full or part time on environmental investigations with both expected to increase those numbers in the next few years. In pursuing these cases, prosecutors are not limited to environmental criminal offenses but often prosecute for traditional Title 18 crimes as well, including conspiracy, false statements, and mail fraud. Pursuant to the United States Attorney's Manual, the Environmental Crimes Section has primary responsibility for the prosecution and enforcement of the federal environmental criminal laws. In so doing, the Environmental Crimes Section has a good working relationship with the Criminal Division and recently employed the services of two attorneys from Criminal Division's General Litigation Section. In addition, there is close consultation between the Lands Division and the Criminal Division on a number of specific cases, including the ongoing investigation at Rocky Flats Nuclear Weapons Plant of the Department of Energy.

12. What is the purpose of the Environmental Crimes Section of the Division?

Answer:

The Environmental Crimes Section was created on April 24, 1987, at which time it assumed the responsibilities previously assigned to the Environmental Crimes Unit, which was organized in 1982. As noted above, the Section was organized in order to provide a specialized legal staff capable of carrying out the effective enforcement of federal criminal laws relating to the protection of the environment. Its duties as outlined in the United States Attorney's Manual at 5-11.002 include conducting all phases of criminal litigation at the direction of the Assistant Attorney General of the Land and Natural Resources Division; cooperation with U.S. Attorneys in the conduct of all phases of criminal litigation in which there is shared responsibility; monitoring all prosecutions under the environmental statutes in order to assure consistency of statutory interpretations and enforcement policy; assistance, advice, and policy guidance to U.S. Attorneys and federal criminal agents; processing of items such as immunity which require action by the Assistant Attorney General or his designee of the Land and Natural Resources Division; and education, training, and coordination with regional, state and local law enforcement groups seeking to become involved in environmental criminal enforcement.

13. The President has just forwarded to Congress his proposed Clean Air Act. The proposal has come under criticism by some environmental groups. Do you perceive your Division as having a role in the discussion of this legislation?

Answer:

Let me assure you that the Land and Natural Resources Division will consult closely with Congress and interested groups in connection with Congress' consideration of President Bush's Clean Air Act.

I have not been privy to the deliberations within the Administration on drafting this bill. But I understand that attorneys within the Division have been assisting EPA and other agencies in drafting parts of the bill and will continue to be of assistance throughout the legislative process. I look forward to working with members of both Houses on the Administration's goal of improving air quality.

The Division is particularly interested in the enforcement tools provided by the bill. It raises criminal penalties to felony level sanctions, adds an endangerment provision similar to that in other statutes for the emission of air toxics, and increases civil penalties.

RICHARD BURLESON STEWART

Birth:	February 12, 1940	Cleveland, Ohio
Legal Residence:	Massachusetts	
Marital Status:	Married	Alice Fales Stewart 3 children
Education:	1957 - 1961	Yale University B.A. degree *summa cum laude*
	1961 - 1963	Oxford University B.A. degree (1963) M.A. degree (1981)
	1963 - 1966	Harvard Law School LL.B. degree *magna cum laude*
Bar:	1968	District of Columbia
Experience:	1966 - 1967	Supreme Court of U.S. Law Clerk to Hon. Potter Stewart
	1967 - 1971	Covington & Burling Legal Associate
	1971 - present	Harvard Law School Law Professor
	1974	U.S. Senate Select Committee on Presidential Campaign Activities Special Counsel
	1980	U.S. Environmental Protection Agency Visiting Scholar
	1979 - 1980	University of California Berkeley Law School Visiting Professor of Law
	1987 - 1988	University of Chicago Law School Visiting Professor of Law

Office:	Harvard Law School Cambridge, Massachusetts 02138 617 495-1839
Home:	27 Gibson Street Cambridge, Massachusetts 02138

To be an Assistant Attorney General

I. BIOGRAPHICAL INFORMATION (PUBLIC)

Information Submitted to the Senate Judiciary Committee
by Richard B. Stewart

1. Full name (include any former names used.)

   Richard Burleson Stewart

2. Address: List current place of residence and office address(es).

   Home: 27 Gibson St., Cambridge, MA 02138
   Office: Harvard Law School, Cambridge, MA 02138

3. Date and place of birth.

   Feb. 12, 1940 Cleveland, Ohio

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Married to the former Alice Peck Fales, Secondary School Teacher, The Potomac School, McLean, Va. (employment effective 9/89).

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   1963-66: Harvard Law School
   LL.B magna cum laude
   Editor, Harvard Law Review

   1961-63: Rhodes Scholar, Oxford University
   Oxford, England. M.A. with First Class
   Honors in Philosophy, Politics and Economics

   1957-61: Yale University, B.A. summa cum laude
   History, the Arts, Letters. Junior Phi Beta

   1953-57: University School, Shaker Heights, Ohio

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

7/71 to 6/89	Law Professor Harvard Law School Cambridge, MA 02138
7/87 to 6/88	Visiting Professor of Law University of Chicago Law School 1111 East 60th Street Chicago, IL 60637
7/79 to 6/80	Visiting Professor of Law University of California at Berkeley Law School Berkeley, CA 94720
7/80 to 8/80	Scholar in Residence U.S. Environmental Protection Agency 401 M Street, S.W. Washington, D.C. 20460
7/74 to 8/74	Special Counsel U.S. Senate Select Committee on Presidential Campaign Activities (Committee no longer exists)
11/67 to 6/71	Legal Associate Covington & Burling 1201 Pennsylvania Ave., N.W. Washington, D. C. 20044
7/66 to 6/67	Law Clerk U.S. Supreme Court Washington, D.C. 20543
6/65 to 8/65	Summer Law Clerk Cravath, Swaine & Moore 1 Chase Manhattan Plaza New York, N.Y. 10005

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Phi Beta Kappa; Rhodes Scholar; Member, American Law Institute; Fellow, American Academy of Arts and Sciences.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

District of Columbia Bar; 1969-present.

American Bar Association, 1968-71, 1988-present. Member, Standing Committee on Environmental Law, 1986-88; Board of Editors, Administrative Law Journal, 1988-present.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Environmental Defense Fund (active in lobbying before public bodies)

American Academy of Arts and Sciences

American Law Institute

Academic Advisory Committee, Foundation for Research on Economics and the Environment

Board of Editors, Oxford Environmental Law Journal

11. Court Admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

District of Columbia Court of Appeals, Jan. 23, 1968

United States District Court for the District of Columbia, Jan. 29, 1968

United States Court of Appeals for the District of Columbia Circuit, Sept. 12, 1969

Supreme Court of the United States

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply a copy of all published material not readily available to the Committee.

Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Books:

Environmental Law and Policy (2d ed. 1978) (with J. Krier)

Administrative Law and Regulation (2d ed. 1985) (with S. Breyer)

Integration Through Law: Environmental Protection Policy Law (with E. Rehbinder) (1985)

Federalism in the Great Republic (forthcoming, 1989)

Articles, Essays and Reviews:

Madison's Nightmare: Federalism and the Regulatory Welfare (Forthcoming, Centro di Studi Americani, Rome)

Can United States Federalism Survive Its Constitutional Death? (Forthcoming, University of Palermo)

International Aspects of Biotechnology and Its Use in the Environment in Biotechnology and the Environment: The Regulation of Genetically Engineered Organisms Used in the Environment (American Bar Association 1988)

Controlling Environmental Risks Through Economic Incentives, 13 Columbia Jl. Envir. L. 153 (1988)

Reforming Environmental Law: The Democratic Case for Market Incentives (with Bruce A. Ackerman, 13 Columbia Jl. Envir. L. 171 (1988)

Regulation and the Crisis of Legalization in the United States, in T. Daintith, ed., Law as an Instrument of Economic Policy; Comparative and Critical Approaches (1988)

Beyond Delegation Doctrine, 36 Am. Univ. L. Rev. 323 (1987)

Book Review: Organizational Jurisprudence (Review of Dan-Cohen: Rights, Persons, and Organizations), 101 Harv. L. Rev. 371 (1987)

Crisis in Tort Law? The Institutional Perspective, 54 U. Chi. L. Rev. 184 (1987)

Organizational Jurisprudence, 101 Harv. L. Rev. 371 (1971)

The Judicial Performance of Robert H. Bork in Administrative and Regulatory Law, 9 Cardozo L. Rev. 135 (1987)

Reconstitutive Law, 46 Md. L. Rev. 86 (1986)

The Role of the Courts in Risk Management, 16 Environmental Law Reporter, 10208 (1986)

Federalism and Rights, 19 Ga. L. Rev. 916 (1985)

Reforming Environmental Law (with B. Ackerman), 37 Stan. L. Rev. 301 (1985)

The Discontents of Legalism: Interest Group Relations in Administrative Regulation, 1985 Wis. L. Rev 655

Legal Integration in Federal Systems: European Community Environmental Law, 33 Am. Jl. Comp. L. 1501 (1985)

Economics, Environment, and the Limits of Legal Control, 9 Harv. Envir. L. Rev. 1 (1985), and in B. Sadder, ed., Environmental Protection and Resource Development: Convergence for Today (1985)

Bureaucratic Justice, 96 Harv. L. Rev. 1952 (1983) (with L. Liebman)

Regulation in a Liberal State, The Role of Non-Commodity Values, 92 Yale L. J. 1537 (1983)

The Limits of Administrative Law in The Courts: Separation of Powers (B. Goulet ed., 1983)

The Legal Structure of Interstate Resource Conflicts in Regional Conflict and National Policy (K. Price, ed., 1982)

Interstate Resource Conflicts: The Role of the Federal Courts, 6 Harv., Envir. L. Rev. 241 (1982)

Public Programs and Private Rights, 96 Harv. L. Rev. 1195 (1982) (with C. Sunstein)

Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 Calif. L. Rev. 1259 (1981)

The Legal Regulation of Risk, in Genetics and Law II (A. Milunsky, ed., 1980)

Using Economic Analysis in Teaching Environmental Law: The Example of Common Law Rule, 1 U.C.L.A. Journal of Environmental Law & Policy 13 (1980) (with J. Krier)

Le "Proceduralisme" Dans le Droit Administratif Americain, 30 Conseil d'Etat Etudes et Documents 303 (1979)

History and Policy Analysis, 31 Stan. L. Rev. 1159 (1979)

Standing for Solidarity, 88 Yale L. J. 1559 (1979)

The Resource Allocation Role of Reviewing Courts: Common Law Functions in a Regulatory Era, in Collective Decision Making: Applications from Public Choice Theory (C. Russell, ed., 1979)

Vermont Yankee and the Evolution of Administrative Procedure, 91 Harv. L. R. 1805 (1978)

Paradoxes of Liberty, Integrity, and Fraternity: The Collective Nature of Environmental Quality and Judicial Review of Administrative Action, 7 Envir. L. 463 (1977)

Pyramids of Sacrifice? Federalism Problems in Mandating State Implementation of Federal Environmental Controls, 80 Yale L. J. 1196 (1977)

Judging the Imponderables of Environmental Policy in Approaches to Controlling Air Pollution (A. Friedlander, ed. 1978)

The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking Lessons from the Clean Air Act, 62 Iowa L. Rev. 713 (1977)

Least Cost Achievements of Environmental Quality Objectives, in Committee on Environmental Decision Making, National Research Council, IIB Decision Making in the Environmental Protection Agency (1977) (with P. Spector)

Energy and The Environment, in Owen and Schultze, eds., Setting National Priorities: The Next Ten Years (1976) (with Roberts)

The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975)

Book review, Baxter: People or Penguins: The Case for Optimal Pollution, Ackerman and Rose-Ackerman, Sawyer, Henderson: The Uncertain Search for Environmental Quality, 88 Harv. L. Rev. 1644 (1975) (with M. Roberts)

Book review, Read, McDonald, Fordham, Pierce, Materials on Legislation, 11 Harvard Journal on Legislation 550 (1974)

The Lawyer and the Legislative Process, 10 Harvard Journal on Legislation 152 (1973)

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. I take medication for gout and hypertension.

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Law Clerk, Justice Potter Stewart, Supreme Court of the United States (appointed) 1966-7.

Special Counsel, Senate Select Committee on Presidential Campaign Activities (Watergate Committee), 1974.

Scholar in Residence, U.S. Environmental Protection Agency 1980.

15. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

Law practice and experience:

Member, Harvard Legal Aid Bureau, Cambridge, MA 1964-5.

Law Clerk, Justice Potter Stewart, Supreme Court of the United States 1966-7.

Associate, Covington & Burling, Washington, D.C., 1967-71.

Assistant Professor of Law, Harvard Law School, 1971-75; Professor of Law, 1975-84; Byrne Professor of Administrative Law, 1984-present.

Special Counsel, Senate Select Committee on Presidential Campaign Activities (Watergate Committee), 1974.

Trustee and member of the Litigation Review Committee, Environmental Defense Fund, New York City, 1976-present (Chairman of the Board, 1981-3).

Visiting Professor of Law, University of California, Berkeley, 1979-80.

Scholar in Residence, U.S. Environmental Protection Agency, 1980.

Visiting Fellow, European University Institute, Florence, Italy, 1984.

Visiting Professor of Law, University of Chicago Law School, 1987-88.

Occasional legal consulting and practice 1985-present, 266 Longsell Hall, 1545 Massachusetts Ave., Cambridge, MA 02138.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

General character of practice and typical former clients.

While a member of the Harvard Legal Aid Bureau I represented indigent clients in domestic relations, housing, and other civil matters.

At Covington and Burling, I represented a variety of major corporations and smaller businesses in regulatory, environmental, antitrust, and appellate litigation matters. I also did pro bono work, assisting in a felony case and handling an appeal of a group of public housing tenants in the District of Columbia in an action against the D.C. Housing Authority.

As a law professor at Harvard Law School and visitor at other law schools I have taught environmental law, administrative law, torts, civil procedure, and corporation.

As special counsel to the Senate Select Committee on Presidential Campaign Activities I was responsible for writing briefs on behalf of the Committee in various court actions.

As trustee and member of the Litigation Review Committee of EDF I have reviewed and passed on litigation initiatives proposed by the EDF staff and supervised and consulted with EDF staff on litigation strategies. This work involved review of draft complaints, briefs, and other legal filings before federal and state courts and administrative bodies on a wide variety of environmental and administrative law and procedural issues.

As Scholar in Residence at the Environmental Protection Agency I studied EPA's regulatory strategies as background for my teaching and writing.

As a legal consultant and counsel during the past several years I have advised the Pension Benefit Guaranty Corporation and Massport and represented a group of hospitals in Arizona in litigations involving regulatory and administrative law issues. I have served as a designated expert witness to ETSI Pipeline Inc. on environmental law issues involved in antitrust litigation.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I have appeared in court on a few occasions. I was associate counsel for the defendant in a felony jury trial in the District of Columbia courts while an associate at Covington & Burling. I also argued an appeal before the D.C. Circuit on behalf of a D.C. Public Housing Tenants' Association. I argued an appeal in the Arizona Court of Appeals.

2. What percentage of these appearances was in:
   - (a) federal courts;
   - (b) state courts of record;
   - (c) other courts.

3. What percentage of your litigation was:
   - (a) civil;
   - (b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
   - (a) jury;
   - (b) non-jury.

I have appeared more frequently in trial proceedings before a number of administrative agencies during 1968-71, including the Federal Power Commission and state environmental agencies.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party of parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Litigation

1. Knox Hill Tenant Council v. Washington, 448 F.2d 1045 (D.C. Cir. 1971) (Panel: Leventhal, McGowan and MacKinnon).

   A group of public housing tenants in the District of Columbia brought a federal district court action against state and local officials seeking relief against substandard housing conditions. The District Court dismissed for want of jurisdiction and failure to state a claim. I briefed and argued the appeal on behalf of the tenants. The Court of Appeals reversed, reinstating the complaint as to most of the defendants and remanded for further proceedings. The case was briefed and argued in 1969.

   Counsel for defendants: John R. Hess, Assistant Corporation Counsel for the District of Columbia; Frank B. Friedman, Department of Justice

2. Purex Corp v. Procter & Gamble Co. 419 F. Supp. 931 (C.D. Cal. 1976) (William Gray, J.) vacated 596 F2d 881 (9th Cir. 1979) later app. 664 F.2d 1105, (9th Cir. 1981) (Chey, Fletcher, Soloman), cert. den. 456 U.S. 983 (1982).

   The FTC determined that Procter & Gamble's acquisition of Clorox violated section 7 of the Clayton Act because Procter & Gamble was a potential entrant to the household bleach industry. After Procter & Gamble's divestiture of Clorox, Purex, Clorox competitor, brought an antitrust action damage against Clorox and Procter & Gamble, claiming that the acquisition had resulted in competitive injury to it. The referenced litigation revolved around the question whether the FTC's order finding the acquisition to violate section 7 was a "judgment or decree" entitled to weight as "prima facie evidence" in the Purex litigation pursuant to the provisions of the Clayton Act. The courts ultimately held that it was. A subsequent bench trial resulted in judgment for the defendants which was affirmed on appeal.

As co-counsel for the defendant Procter & Gamble I assisted in writing the briefs in the District Court and Court of Appeals proceedings referenced above. I was also principally responsible for handling all of the discovery work on behalf of the defendants and for research of legal issues relating to the case. The activities occupied a substantial portion of my time from 1967 to 1971.

Counsel for Purex: Julian O. von Kalinowski, Gibson Dunn & Crutcher, Los Angeles.

3. Gottesman v. General Motors Co., 436 F.2d 1205 (2d Cir. 1971) (Panel: Morris, Moore, Ryan)

In a government antitrust action the Supreme Court found that du Pont's ownership of a substantial block of General Motors stock violated section 7 of the Clayton Act because it potentially constrained competition in automotive and appliance paints and finishes, and ordered divestiture. Thereafter General Motors shareholders brought a derivative action against du Pont claiming that it had used its position as a stockholder to injure General Motors by selling it paints and finishes at excessive cost. The Court of Appeals affirmed a district court judgment for du Pont. I assisted in writing the appeals briefs on behalf of du Pont. This work was done in 1970.

Counsel for plaintiffs: David Brady, 120 Broadway, New York City.

4. In the Matter of the Appeal of the Variance Application of the American Smelting and Refining Co., Washington, State Pollution Control Hearings Board (1971).

American Smelting and Refining Co. (ASARCO) appealed to the Washington State Pollution Control Board the denial by the Puget Sound Air Pollution Control Authority of a variance from certain sulfur dioxide control regulations application to ASARCO's smelter in Tacoma, Washington. I, along with local counsel for ASARCO, briefed and argued the appeal, which included an evidentiary hearing. The Board granted part of the relief sought by ASARCO. The preparation for and conduct of the appeal occurred in 1971.

Counsel for Puget Sound Pollution Control Authority: Keith McGoffin, Burkey, Marisco, Rovai & McGoffin.

Counsel for Clean Air for Washington: Professor William H. Rodgers Jr., University of Washington School of Law.

5. Upjohn Co. v. Finch, 422 F.2d 944 (6th Cir. 1970) (Panel: Phillips, Edwards, Peck)

In 1969 the FDA issued an order removing from the market Upjohn's combination antibiotic drug Panalba on the grounds that there was lack of substantial evidence of its efficacy. Upjohn petitioned for review of this order in the Sixth Circuit, which upheld FDA's action. Upjohn unsuccessfully sought a stay from the Supreme Court. I assisted in preparating briefs and memoranda before the FDA the Sixth Circuit, and the Supreme Court. This work was done in 1969 and 1970.

Counsel for FDA: William W. Goodrich.

6. Mt. Mansfield Television Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971) (Panel: Hays, Anderson, and Tyler)

Television networks and broadcasters petitioned the Second Circuit Court of Appeals for review of the FCC's Prime Time Access Rule, which sought to restrict television network involvement in the development of television programs and encourage the growth of independent producers. I helped write the briefs for CBS Television Affiliates, one of the intervenors. The court upheld the FCC's rule. Work on the briefs was done during 1970.

Counsel for FCC: John H. Conlin, Assoc. General Counsel FCC, Howard Shapiro, Department of Justice

7. Senate Select Committee on Presidential Campaign Activities v. Nixon 366 F. Supp. 51 (D.D.C. 1973) (Sirica, J.)

The Senate Select Committee on Presidential Campaign Activities filed a federal district court action against President Nixon to subpoena tapes of White House conversations. On the Committee's motion for summary judgment, the District Court held that it lacked jurisdiction over the matter. The Committee appealed. Following Congressional legislation authorizing the Committee to bring suit for this purpose, the Court of Appeals remanded for further proceedings. The District Court denied the Committee's subpoena on the ground that the interest of potential criminal defendants in the matter in a fair trial outweighed the Committee's interest in obtaining the tapes. The Court of Appeals affirmed, on the ground that in the special circumstances of the case, an impeachment proceeding against the President having already been begun in the House, the subpoena should not be enforced.

As Special Counsel to the Committee I was principally responsible for preparing the briefs and memoranda in the initial District Court proceeding and assisted in the preparation of briefs in the subsequent proceedings in the case.

Counsel for defendant Nixon: Leonard Garment

8. St. Mary's Hospital v. Arizona State Department of Health (Ariz. Ct. Appeal, 2d Div., 1987)

A group of hospitals brought suit in Arizona state court against the Arizona State Health Department, contending that the Department's failure to supervise and regulate bankrupt financial intermediaries in the Arizona Medicaid program (who were also made defendants) violated state and federal law and caused the plaintiffs to suffer substantial financial loss as a result. The trial court dismissed on the ground that the plaintiffs must first exhaust their administrative remedies. The Court of Appeals affirmed. However, the Arizona courts thereafter allowed plaintiffs to proceed with the litigation after the State Health Department failed to provide the relief which they sought.

I briefed and argued the appeal for the hospitals before the Court of Appeals in 1987. I also participated in preparing the briefs in subsequent proceedings before the Arizona Supreme Court.

I do not recall counsel for the other parties.

9. Pension Benefit Guaranty Corp. v. LTV Corp., C.A. Nos 86-6246, 88-6252, (2d Cir. May 12 1989) (Panel: Van Graafeiland, Meskill, and Miner)

PBGC sought to restore previously terminated pension plan obligations of LTV. The District Court found that PBGC lacked such authority or had not adequately justified its exercise in this case. During 1988 and 1989, I participated in the preparation of PBGC's initial appeal brief and its reply brief.

Counsel for LTV: Lewis B. Kaden, Davis Polk & Wardwell, New York City, Michael J. Crames, Levin, Weintraub & Crames, New York City; for Official Committee of Unsecured Creditors, Brian Cogan, Strook, Strook & Lavan, New York City; for LTV Bank Group, Geoffrey M. Kalmus, Kramer, Levin, Nessen, Kamin & Frankel, New

York City; for Official Committee of Equity Security Holders, Claude D. Montgomery, Myerson & Kuhn, New York City; for BancTexas Dallas, Kathryn C. Mallory, Haynes & Boone, Dallas, Texas.

10. ETSI Pipeline Project v. Atchison, Topeka & Santa Fe CA B-84-979CA, (D.E.D. Tx. Beau. Div) (Parker, J.)

Plaintiff ETSI proposed to build and later cancelled construction of a coal slurry pipeline. It brought a federal antitrust action against several railroads, asserting that they had harassed and delayed the pipeline by conspiring to deny the pipeline rights of way and by initiating administrative proceedings and a federal court lawsuit challenging the pipeline on environmental law grounds. I was designated expert witness for ETSI on environmental law issues and conducted extensive legal research and review of documents and legal proceedings in preparation for testimony. My deposition was taken but I did not testify at trial because of unexpected developments in litigation strategy. I also assisted in the preparation of briefs and legal memoranda filed with the Court. All of the railroad defendants settled except the Santa Fe. ETSI won a large jury verdict against the Santa Fe, which is currently on appeal.

My preparation as an expert witness was from 1986-89. I was deposed in 1987 and again in 1988. During 1988 and 1989, I assisted in the preparation of legal briefs and memoranda.

Counsel for Santa Fe: Frederick P. Furth, Furth, Fahrner, Bluemle & Mason, San Francisco.

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

The legal activities that I have pursued consist of the following:

a. Service as a Supreme Court law clerk.

b. Four years of practice in Washington, D.C., including preparation of briefs and memoranda in connection with federal court litigation involving regulation, environmental law, antitrust and other matters and two court appearances, and appearances before federal and state administrative agencies in environmental and regulatory matters.

c. Eighteen years of teaching, research, and published scholarship primarily in the areas of environmental and administrative law. Publications are listed in item 12.

d. Twelve years as trustee and member of the Litigation Review Committee of the Environmental Defense Fund, reviewing proposed litigation initiatives and counseling on legal strategy in connection with environmental litigation.

e. Legal counselling, brief writing, and a court appearance for a variety of clients on matters involving administrative and environmental law during the past several years.

f. Brief writing in various federal court litigation matters during one summer as Special Counsel to the Senate Watergate Committee.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   I plan to take a leave of absence from Harvard University. During my period of leave, I plan to continue to participate in certain University employee benefit plans: life and disability insurance and perhaps health care insurance. I will pay for the cost of these benefits.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I will follow all applicable procedures, and consult with appropriate Ethics Officials to prevent any conflict from occurring. I currently have financial interests in several companies which are involved in litigation with the Land and Natural Resources Division and am consulting with the Office of Government Ethics and the Department Ethics Officials to insure that proper action is taken to avoid conflicts arising from those interests before I assume responsibilities as Assistant Attorney General.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

   I plan to continue to participate in the American Law Institute Project on Compensation and Liability for Product and Process Injuries.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do

so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See Financial Disclosure Form SF 278 to follow.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

See statement and schedules attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	46	800	00
U.S. Government securities—add schedule	76	000	00
Listed securities—add schedule	1242	900	00
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	679	100	00
Real estate mortgages receivable			
Autos and other personal property	56	500	00
Cash value—life insurance			
Other assets—itemize: See attached			
schedule	352	300	00
Total assets	2453	600	00

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured	10	000	00
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule	100	300	00
Chattel mortgages and other liens payable			
Other debts—itemize: Credit cards	5	000	00
Total liabilities	115	300	00
Net worth	2338	300	00
Total liabilities and net worth	2453	600	00

CONTINGENT LIABILITIES	NONE		
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.) NO			
Are you defendant in any suits or legal actions? NO			
Have you ever taken bankruptcy? NO			

Richard B. Stewart

Senate Judiciary Committee
Questionnaire for Non-Judicial Candidates
Schedule of Supplemental Information for Financial Statement

(figures in thousands of dollars)

U.S. Government Securities:

Fidelity Daily Income Trust:	1.7
Fidelity Cash Reserves:	2.7
NCC Money Market Funds:	45.2
Savings Bond	.1
Putnam High Income Gov't Trust:	26.3
	76.0

Listed Securities:

Agency Account, National City Bank of Cleveland (see attachment):	795.7
Trusts, Norwest Bank of Minneapolis (see attachment):	447.2
	1242.9

Real Estate:

House, Cambridge MA.	522.7
House, Wellfleet Ma.	141.2
Interest in commercial real estate, Ft. Worth, Texas	15.2
	679.1

Autos and Other Personal Property:

1988 Ford Taurus	9.5
1984 Volvo	7.0
Misc. Household Furnishings	40.0
	56.5

Other Assets:

Law Textbook Copyrights	44.1
Interest in Texas Oil Leases	6.7
Retirement Benefits - TIAA/CREF	301.5
	352.3

Real Estate Mortgages:

Cape Cod 5 Cents Savings Bank	13.7
Harvard University	86.6
	100.3

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   As a law student, I worked approximately 20 hours per week for a year as a member of the Harvard Legal Aid Bureau providing legal representation to poor clients. While an associate at Covington & Burling, I served for several weeks as junior counsel in a felony trial of an indigent client. I also assisted in a variety of pro bono activities at Covington & Burling, including research on proposed litigation challenging discrimination in provision of municipal services in the District of Columbia. I served over a period of several months as counsel for a group of D.C. public housing tenants in an appeal before the United States Court of Appeals for the District of Columbia Circuit, writing the brief and arguing the appeal. At Harvard Law School I have served for four years as a member and as chair of the Clinical Committee, which reviews and supervises the extensive programs at Harvard School for student representation of the disadvantaged. During that period I spent 30-40 hours a year attending committee meetings, meeting with students and clinical supervisors, visiting clinical practice centers, attending conferences of clinical educators, and writing reports evaluating the School's clinical programs and proposing measures to improve them.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

   Not to my knowledge.

AFFIDAVIT

I, Richard Burleson Stewart, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 28 1989
(DATE)

Richard Burleson Stewart
(NAME)

(NOTARY)

My Commission Expires March 14, 1990